# ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION



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## AGENDA OF ANNUAL MEETING

**Chicago, Illinois**

The Blackstone

Saturday, August 14

12:00 M. Luncheon meeting of Council and Committee Chairmen

2:00 P.M. Meeting of Council *

Sunday, August 15

9:30 A.M. Meeting of Council *

12:30 M. Luncheon Meeting of Council and Committee Chairmen

2:00 P.M. Meeting of Council *

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

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Monday, August 16

2:00 P.M. Special Program: Do Administrative Proceedings Endanger the Public?

A panel discussion of problems being considered by the Hoover Commission Task Force Groups and of major concern to the profession with respect to two principal fields:

1. Should non-lawyers practice before federal administrative agencies?

2. Is the function of judicial review of administrative action being abdicated?

Tuesday, August 17

10:00 A.M. General Session

*John W. Cragun, Chairman, presiding*

Appointment of Nominating Committee

Report of the Chairman

Report of the Committee on Organization, Louisa Wilson, *Chairman*

Hearing Examiners:

Report as to Legislation:

Committee on Hearing Examiners, Robert F. Jones, *Chairman*

Committee on Administrative Procedure Act, J. D. Bond, *Chairman*

Committee on Improvement of Administrative Procedures, Ralph F. Fuchs, *Chairman*

Report of the President's Conference on Administrative Procedure on Hearing Examiners

Discussion: The Task Force on Legal Service and Procedure of the Hoover Commission

Committee Reports:

Comptroller General—General Accounting Office, William D. McGraw, *Chairman*

Natural Resources and Interior Affairs, Northcutt Ely, *Chairman*

2:00 P.M. General Session

Discussion of Pending Legislation, Rufus G. Poole, *Chairman,* National Committee

Discussion: The President's Conference on Administrative Procedure

Committee Reports:

Advertising, Trade and Securities Regulation, Herman Tocker, *Chairman*

Immigration and Naturalization, Louis L. Jaffe, *Chairman*

Administrative Agency Fees and Charges, Clarence D. Todd, *Chairman*

Administrative Practitioners, Admission and Ethics, F. Trowbridge vom Baur, *Chairman*

Report of Nominating Committee

Election of Officers, Council Members and Section Delegate

## COMMITTEE ON ADMINISTRATIVE AGENCY FEES AND CHARGES

RESOLVED, That the Section of Administrative Law recommend that the House of Delegates adopt the following resolution:

BE IT RESOLVED, That it is the position of the American Bar Association that regulatory powers of the Federal Government may properly be exercised only to correct conditions which adversely affect the public interest, and those subject to regulation should not be required to pay fees for the purpose of defraying or par-

* Committee Chairmen invited.

tially defraying the cost of such regulation. Provided, however, if a governmental agency furnishes facilities, equipment, loans, advances or services, then a fee designed to recover the direct cost of such facilities, equipment, loans, advances or services is proper.

BE IT FURTHER RESOLVED, That the Section of Administrative Law be authorized and directed to advocate the views set forth above before any committee of Congress considering legislation concerning agency fees.

To place in perspective the question of fees to be charged by agencies of the United States Government, one must examine the reasons for the existence of those agencies. Within the area of concern it may be stated as a general principle that apart from functions inherent in the sovereign and the public domain the only justification for governmental regulation of activities under our form of government and the underlying concepts of free enterprise is to protect the public from the disastrous effects of untrammelled pursuits. To regulate commerce, in the sense intended in the commerce clause of the Federal Constitution, Article I, Section 8, is to foster, protect, and control commerce with appropriate regard to the welfare of those who are immediately concerned as well as the public at large and to promote its growth and insure its safety. *Dayton-Goose Creek Railway Company* v. *United States,* 263 US 456, 44 S. Ct. 169. Furthermore, this "public interest" is not a concept without ascertainable criteria. In the transportation field, for example, it has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision for and best use of transportation facilities. *New York Central Securities Corporation* v. *United States,* 287 US 12, 53 S. Ct. 45.

The Interstate Commerce Commission performs its duties of protecting the public from ruinous competitive practices through regulation of the number of the carriers in operation and the rates they may charge for their services. See *United States* v. *Great Northern Railway Company,* 343 US 562, 72 S. Ct. 985; *New England Divisions* case, 261 US 184, 43 S. Ct. 270.

Another facet of the public interest provides a reason for intervening in harmful labor strife:

"It is declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 61 Stat. 136, 29 USCA, § 151.

Other areas, to name two, in which governmental action has been necessary for public protection may be found in the inspection (for reasons of health) of agricultural commodities and in the widely misunderstood regulation of the radio broadcasting industry.

While it may be that there is no such thing as a "natural right" to enter into an endeavor, it is clear that the Federal power

to regulate is limited to correction of the evil affecting the public interest.

Referring to the National Labor Relations Board, the United States Supreme Court said: "In determining the constitutional bounds of the authority conferred, we have applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion." *Consolidated Edison Company* v. *National Labor Relations Board,* 305 US 197, 222; 59 S. Ct. 206, 214. And protection of the public from ruinous interference among radio stations is the only factor which warrants Federal control. *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Company,* 289 US 266, 53 S. Ct. 630; see also *"Ownership" of Broadcasting "Frequencies,"* 19 Rocky Mountain Law Review 111.

These instances of regulation are far different from a governmental grant of a privilege springing from the public domain, as, for example, a license to hunt ducks on a government reservation. Generally, that may be subject to any condition the government sees fit to impose. In none of the instances cited is it the intent of the regulation to benefit primarily the regulated; in none is the government's purpose to dispense favors. The authorities leave no doubt that the only justification for government concern and the resultant administrative tribunals is the protection of the public. It would seem, therefore, that unlike the duck hunter, an entrepreneur should not be required to bear the cost of his own regulation. Rather, since the only reason for governmental intervention in activities from which the public benefits greatly is protection of the public itself, the general public should provide for its own welfare in this instance.

During World War II and the Korean Period, emergency legislation was enacted and emergency agencies created to administer the activities authorized by such legislation. In carrying out these programs, the agencies, in addition to regulating, actually furnished equipment, facilities, loans, advances and services. These activities were carried on to encourage certain functions of private industry. To charge a fee which would cover the full cost to the government would tend to discourage the use of that which the government was furnishing, which in turn would impede the progress of the entire program. This would not be a necessary result if the fee were designed to cover the direct cost to the government. However, the broad principle that those persons or organizations whose activities are thought to require regulation should pay the cost is out of harmony with the principle that such regulation is designed to protect and promote the public interest.

The committee has not had an opportunity to read and formally vote on this report. The chairman of the committee has had the benefit of the views of each member and has incorporated into the report these views which were submitted in writing.

Respectfully submitted,

COMMITTEE ON AGENCY FEES
/s/ Clarence D. Todd
Clarence D. Todd
Chairman

## COMMITTEE ON ADMINISTRATIVE PRACTITIONERS, ADMISSIONS AND ETHICS

I. 1. *The Administrative Practitioners and Ethics Bill:* The work of this Committee has centered this year, again, around the Administrative Practitioners and Ethics Bill which has the approval of the Association and which is a joint project of this Committee and of the Standing Committee on Unauthorized Practice of Law. In fact, the Bill is today the result of some seven years ardous effort by the Association in an endeavor to deal with the subject of administrative practice comprehensively. Current Bills in Congress which deal with various separate aspects of administrative practice are listed in the Appendix. In 1953 it was our hope to arrange for introduction of the Bill into Congress early in that year. But because of the interest expressed by the American Institute of Accountants, introduction of the Bill was withheld until that group had had an opportunity to express its views. The Accountants took a position in opposition to the Bill, and a series of correspondence and negotiations followed. On December 15, 1953, John Cragun, Chairman of the Section, and John D. Randall, on behalf of the Standing Committee on Unauthorized Practice of Law, met with John Carey, the Executive Director of the American Institute of Accountants, and Mr. Cragun and the Chairman of this Committee met with Mr. Carey again on February 16. The Bill was then revised in an endeavor to meet the objections expressed by the Accountants, and a copy of the Bill in latest draft is appended hereto. However, the Accountants still oppose the bill, on the following grounds, among others:

A. They insist on the right to practice before the Tax Court. They state that there are no questions of law presented in the application of the Internal Revenue Code, only questions of accounting, and that the question as to what constitutes "taxable income" presents only an accounting question. Also, they say that they should be able to draft Petitions and file cases in the Tax Court because that is part of the "settlement procedure" of the Treasury Department.

B. The Accountants do not want to be bound by the standards of legal ethics in practice before the Tax Court or otherwise, to the extent that such standards may be applicable to their practice.

C. They insist on a right to be free from the supervision of any group composed of lawyers, including the judges of the Federal Courts, for disciplinary or other purposes.

Since Section 4 of the Bill would prevent non-lawyers, in the future, from acting as trial counsel before those agencies which conduct adversary proceedings ("Section 5 Proceedings"), the contest which is apparently looming up between ourselves on behalf of the legal profession, and non-lawyer groups, may well present one of the major questions directly affecting the legal profession which has arisen in many years. Broadly speaking, that question is whether, under the guise of "administrative practice", non-lawyers should be permitted to

practice law and to widen the unauthorized practice of law. The basic need is a delineation of what constitutes the "practice of law" before administrative agencies. The Administrative Practitioners and Ethics Bill will at least make clear that formal adversary administrative proceedings are part of the practice of law.

During the year conferences were also held by Officers of this Committee and the Section with representatives of the National Society of Public Accountants on the Administrative Practitioners and Ethics Bill.

2. *Treasury Department Circular 230:* Because of the importance of this Circular and its proposed revision, the President of the Association appointed a Special Committee on the Treasury Department Circular 230, with John D. Randall as Chairman thereof and with the Chairman of this Committee as one of its members. The report of that Committee is filed separately.

3. *Hoover Commission Task Force No. IV:* During the year the Hoover Commission on Legal Services and Procedures in the Government set up Task Force IV to deal with the subject of admission to practice before administrative agencies. Reginald Heber Smith was named as Chairman, David F. Maxwell and James M. Landis as members, and James Casner as consultant. The Chairman of this Committee and Thomas J. Boodell, Chairman of the Standing Committee on Unauthorized Practice of Law, were authorized to appear before this Task Force on behalf of the American Bar Association. One of the things which the Task Force is studying is the proposed Administrative Practitioners and Ethics Act. Mr. Boodell and the Chairman of this Committee accordingly appeared and testified generally in support of the Bill. During the hearings, one of the witnesses who appeared in opposition on behalf of a non-lawyer group stated that he believed that no lawyer should be permitted to practice before the Interstate Commerce Commission until he had taken and passed a special examination. He further stated that, while all the non-lawyers in the group were qualified to appear and try cases before that Commission, not all the lawyers in that group were so qualified. These statements so shocked and horrified the Chairman of this Committee, who happened to be present while they were made, that, with the permission of the Chairman of the Section, he requested the Hoover Commission Task Force for an opportunity to appear and present evidence on the qualifications of lawyers generally to practice before administrative agencies. With the valuable assistance of Clarence D. Todd and Dale Dillon, two members of the Committee, and of the Section on Taxation, Thomas N. Tarleau, Chairman, and Cecil Kilpatrick, a former Chairman, evidence on the type described was presented. In general, we took the position that law today, as in the past, is a seamless web; that the subject matter of practice before such agencies as the Interstate Commerce Commission and the Tax Court is part of that seamless web; and that lawyers are as qualified to engage in administrative practice, particularly administrative litigation, as in any other branch or field of the law.

Thus the legal profession is not only engaged in a major battle over whether the unauthorized practice of law is to be widened under the cloak of "administrative prac-

tice"; we are also faced with an effort to shatter our basic tradition that law is a seamless web into a large number of fragments, each bearing the name of some "specialty." It is the view of this Committee that any "specialization" which may develop in adversary administrative practice should be recognized as specialization in a field which is essentially legal in character. To treat these "specialties" as being in non-legal fields would only open the door to participation by non-lawyers and would dilute the integrity of law itself as the foundation of our society.

4. *Statutory Limitations on Fees for Legal Services Rendered before Administrative Agencies:* For the reasons stated in last year's Report, this Committee is opposed to statutory limitations on fees for legal services to be rendered before administrative agencies. Summarized briefly, such statutory limitations on legal fees are undesirable in that, in practical effect, a limitation on a potential legal fee is a present limitation on the right of a party to an administrative proceeding to be represented by counsel. While this Committee did not recommend action on this subject last year for the reasons then stated, we now believe that remedial legislation should be sought as promptly as possible. Accordingly, we recommend to the Section adoption of the following Resolutions:

"RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'BE IT RESOLVED, THAT, in the opinion of the American Bar Association statutory provisions which place arbitrary or unreasonable limitations on fees for legal services to be rendered before administrative agencies, such as those presently applicable to the Veterans Administration, are in practical effect restrictions on the right of a party to an administrative proceeding to be represented by counsel, and are utterly irreconcilable with the public interest;

'FURTHER RESOLVED, THAT the Section of Administrative Law be and it hereby is authorized and directed to advance appropriate legislation to that end.'"

## APPENDIX

## CURRENT LEGISLATION IN CONGRESS RELATING TO ADMINISTRATIVE PRACTICE (ASSIGNED TO JUDICIARY COMMITTEES)

1. *Admission to Practice bills:*

*H.R.* 485, *H.R.* 1744 and *H.R.* 2117, provide that members of the bar of a State or Federal court shall be eligible to practice before all administrative agencies; These bills were adversely reported to the full Committee on February 1, 1954. Their basic objective is embodied in the Administrative Practitioners and Ethics Bill.

2. *Conflict-of-Interest Bills:* In view of the setting up of the Committee on Code of Conduct for Government Employees, we believe that conflict of interest bills more directly fall within the jurisdiction of that Committee, and that bills of this character should be referred to it. Hence, our comments on them will be brief. First, we are in general sympathy with the objective of ethical conduct on the part of Government employees. We believe, however, that there

is a limit to which ethics can be legislated; and that there is, in our opinion, a basic need in America for the development of a high tradition of public service. For there are matters which can be accomplished by tradition which cannot be accomplished through mere enforcement of the letter of the law.

The following bills on this subject have been referred to this Committee:

*S.* 26 would prohibit the employment of former Government employees except under certain conditions. A report is now pending in the Subcommittee.

*S.* 43, to prohibit Government employees from accepting payments for appointment to office: postponed indefinitely by the full Committee.

*S.* 233 and *S.* 637 relating to disqualification of former officers and employees in matters connected with their former duties. Reports are presently pending in the Subcommittee. These bills are too broad in that they would prevent a former employee of the Government department from acting as attorney, within two years from date of separation "in relation to which such department or agency is a party", even though the former employee had absolutely no official knowledge of the case.

*H. R.* 990 prohibits under certain conditions the employment of former employees of the Federal Government. No action has been taken on this bill.

3. *Attorneys Liens in Administrative Practice:*

*H. R.* 3432, to provide for attorneys' liens in proceedings before the courts or administrative agencies. No action has been taken on this bill. This bill would only do for Federal administrative practice by attorneys-at-law what State law now generally provides for State practice, and has the approval of this Committee.

## COMMITTEE ON ADVERTISING, TRADE AND SECURITIES REGULATION

This Committee is divided into two subcommittees, a subcommittee on the Federal Trade Commission, of which Vice Chairman, Sumner S. Kittelle is Chairman, and a subcommittee on the Securities and Exchange Commission, of which Vice Chairman Albert J. Brown is Chairman. Our other Vice Chairman, Chester T. Lane, has worked closely with Mr. Brown during the past year.

The work of this Committee during the past year has been concerned with three major items, (1) the qualifications and appointment of Hearing Examiners, (2) proposed rules for the Federal Trade Commission to implement the recommendations of the President's Conference, and (3) proposed rules for the Securities and Exchange Commission for the same purpose.

The proposed rules for both the FTC and the SEC were drafted soon after the recommendations of the President's Conference were made known, were submitted for consideration to the respective subcommittees concerned, there was substantial agreement among all committee members and, with such modification or comments as were received, were passed on to the SEC and

the FTC. Copies of the letters of transmittal and of the proposed rules are attached to this report. They were acknowledged by both agencies.

In general, although the rules prepared for the SEC are different from those prepared for the FTC, they have the same objective, implementation of Paragraphs 4, 5, 6, 7, 8 and 10 of Part C of the First Report of the President's Conference on Administrative Procedure.

Very soon after Earl Kintner, Chairman of the Committee on Hearing Officers in the President's Conference on Administrative Procedure, (and also a member of our committee), prepared his "Outline of Desired Information on the Status of Federal Hearing Officers", it was distributed to all members of the Committee and replies were received from a very large cross section. While it would be hopeless to attempt to reconcile all parts of all replies, there was substantial agreement on a number of points: *Experience:* All felt that experience in a government agency was desirable and most felt that additional experience in private practice or other fields should be required. *Qualifications:* Knowledge of the law and of administrative procedures coupled with judicial temperament; most did not regard specialized knowledge of the work of particular agencies as prerequisite. *Recruitment:* Should not be confined to government personnel. Almost all opposed *selection and appointment* by the agency concerned; most favored appointment through an Office of Administrative Procedure. Separation of the Hearing Officer from the agency was favored but all recognized the need for expertise and so extended tours of duty with particular agencies were recommended. Completely independent *Office of Administrative Procedure* is favored. *Permanent tenure* with removal only upon substantial grounds for cause is favored by all but one. Recommendations of the majority as to salary varied from $10,000. to $12,000. per annum. Perhaps much of this is academic in the light of the Association's approval of the Section's resolution at the Midwinter meeting.

During the past year, a major development in SEC practice was the requirement that non-resident brokers or dealers, their general partners and managing agents file consents to service of process (18 F.R. 2850). A similar rule for non-resident investment advisors and their associates is due to become effective August 2nd, 1954.

During the year, the matter of SEC's control of counsel fees in PUHC Act cases was referred to this committee. It was given extensive study by Vice Chairman Albert J. Brown and then referred to Vice Chairman Chester T. Lane to determine whether general committee action was indicated. The conclusion was that filing of a brief *amicus curiae* in certain pending cases would not be feasible and, since the reorganizations under the Act are substantially completed, it would not be practical to engage in an extended study.

The FTC amended its Rules of Practice to provide for consent orders by negotiations at any time after the issuance of a cease and desist complaint (19 F.R. 2654). Provision is made for a period of time in which negotiations for a consent may be had. If a proposed stipulation for a consent order is rejected by the Examiner, there is

provision for appeal to the Commission. If proposals for a consent order do not result in such an order, they do not become part of the official record of the proceeding. If the Examiner accepts the proposal, he makes and files an initial decision which becomes the decision of the Commission within thirty days after completion of service unless the Commission stays the effective date or places the case on its own docket for review. In the latter event the Commission retains all powers. The decision will not contain Findings of Fact and Conclusions of Law because these must be waived as part of the procedure. At the same time FTC brought its Hearing Examiner rules into line with this amendment.

The Federal Trade Commission's present rules are being considered with a view to a complete rewriting. In this connection, numerous recommendations made by this committee last year following its annual report, as well as the recommendations with respect to evidence and pretrial conference rules, are under consideration by the Commission. These are also being studied by the FTC Committee of the Anti-Trust Law Section, with which Vice Chairman Kittelle is working very closely.

An important case holding that the FTC may not substitute a Hearing Examiner to replace another Examiner who retired after he conducted the hearing is *Gamble-Skogmo, Inc. vs. FTC*, 22 *U.S. Law Week* 2412 (*C.C.A. 8th Circuit*) It was held that retirement of a Hearing Examiner is not an unavailability within the meaning of subdivision c, Section 5, APA.

In closing, I should like to observe that Mr. Brown made the original draft of the proposed SEC Rules amendments and that Mr. Kittelle prepared the original draft of the FTC Rules amendments. Committee members who aided in or submitted comments with respect to the final drafting of the rules were Chester T. Lane, Harold Harper, Hammond E. Chaffetz, A. M. Gilbert, Carl R. Miller, Frank R. Pitt, Robert W. Austin and Elmer M. Cunningham.
July 2nd, 1954.

Respectfully submitted,

/s/ Herman Tocker
Herman Tocker, Chairman.

## COMMITTEE ON AGRICULTURE, FOOD, DRUGS AND PUBLIC HEALTH

The enactment of Public Law 335 (H.R. 6434, 83d Cong.) was, perhaps, the most important legislative development in the food and drug field from an administrative procedure standpoint. This measure was actively supported by the profession and by the Food and Drug Administration. Its objective is the simplification of procedures involved in food standardization proceedings under the Federal Food, Drug and Cosmetic Act. Under the new law food standards may be established on an informal basis in the absence of objection and request for a formal hearing by an interested person. When formal hearings are so requested and held, the issues at the hearings are limited to those specifically objected to. In addition, the administrative process for establishing or amending a food

standard may now be initiated upon the petition of any interested person. The new procedure should be a forward instrument in achieving a desirable flexibility and economy in the administrative process without sacrificing basic rights or privileges of those affected.

H.R. 7125, 83d Cong., which replaced H.R. 4277 of the last session of Congress, has been passed by the Congress and is now before the President for executive action. It is intended to simplify and improve the method under the Federal Food, Drug and Cosmetic Act for establishing tolerances for pesticide chemicals remaining in or on raw agricultural commodities. It is carefully meshed in with the Administrative Procedure Act and provides for a court review procedure which accords with the traditional pattern for rule-making proceedings. Of interest from an administrative law standpoint are provisions enabling the establishing of regulations on the basis of informal hearings, requiring formal public hearings only upon objection made by an interested person and limiting the issues at such hearings to those in actual dispute, and setting up independent advisory committees to assist in the administrative process. These provisions are of general interest under the Federal Food, Drug and Cosmetic Act and have been included in, at least, one pending measure relating to the regulation of chemical additives in food —H.R. 8418.

Of importance in the food and drug field from a substantive standpoint was the passage of the "factory inspection" bill (H.R. 5740) on August 7 of last year—Public Law 217. This bill was commented on in the last report of this committee. It restores the factory inspection authority of the Food and Drug Administration under the Federal Food, Drug and Cosmetic Act. This authority was invalidated by the Supreme Court in the *Cardiff* case.

*Read v Ewing,* 205 F. (2d) 630 (1953), was one of the more important judicial pronouncements in recent years under the Federal Food, Drug and Cosmetic Act of interest in administrative law. Frequently posed is the question—who has the right to seek judicial review of an administrative order or regulation where the applicable statute gives such right to any person "adversely affected"? In the *Read* case, the United States Court of Appeals for the Second Circuit, in sustaining an order allowing the use of synthetic Vitamin A as an optional ingredient in margarine, held that the petitioner had standing to obtain judicial review solely by reason of his status as a member of the consuming public. Because the petitioner in this case had a little of a unique status, it may be questioned whether this decision does not open up a Pandora's box in this area of administrative law. The decision represents a marked liberalization of the traditional conservative policies followed by the courts on issues of proper standing.

An important contribution to the legal literature on the Federal Food, Drug and Cosmetic Act is made in the publication of "Developments in the Law—The Federal Food, Drug and Cosmetic Act" which appears in the February 1954 issue of the Harvard Law Review.

There were no significant legislative developments concerning administrative prac-

tices or procedures under statutes administered by the Department of Agriculture or the United States Public Health Service. One bill—H.R. 8164—was introduced which is designed to exempt certain functions of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 from the requirements of Sections 3 and 4 of the Administrative Procedure Act. Necessarily, this attempt to whittle away at the coverage of the Administrative Procedure Act is of concern to the Committee. A canvass of the members of the Committee indicated unanimous opposition to the bill. However, our inquiries have indicated that there is absolutely no interest in the bill in Congress and no pressure for passage. Accordingly, no formal action is recommended.

One interesting decision was handed down under the Federal Insecticide, Fungicide and Rodenticide Act of 1947. This Act is administered by the Department of Agriculture. The litigation giving rise to this decision originated when the Government seized an insecticide allegedly in violation of the Act. The trial court held in favor of the claimant of the seized product. The product was then sold. The Government then appealed to the United States Court of Appeals for the Seventh Circuit but the court held that it had no jurisdiction to review the case because the question before it was moot by virtue of the products' having been sold. The court then ordered the lower court to dismiss the action. Because this action by the Court of Appeals opens the door for relitigation of the issues originally decided favorably to the claimant, the claimant has petitioned the Supreme Court for certiorari. (*Victrylite Candle Co. v U.S.*, Docket 101, Oct. 1954 term.)

John D. Conner
Chairman

J. Albert Hutchinson
Vice Chairman

## COMMITTEE ON CODE OF CONDUCT FOR GOVERNMENT EMPLOYEES

This Committee of the Administrative Law Section was continued to carry out the mandate of the House of Delegates that the Administrative Law Section give further study to the matter of a Code of Conduct for Government Employees and particularly to follow and report on any additional legislative proposals.

The following resolution was proposed by the section and adopted by the House of Delegates at the session of February 23, 1953—

> "4. Resolved, (a) That the American Bar Association disapprove S. 2293, 82nd Congress, in the form in which it was introduced. (b) That the American Bar Association approves in principle, and recommends to the President of the United States and to Congress the establishment of a commission on ethics in Government, empowered to conduct hearings, study applicable laws, make specific recommendations concerning the improvement and maintenance at a high level, of the moral standards of official conduct of elective and appointive officials, officers and employees of the United States."

Recommendation 4(c) was referred to the Committee on Scope and Correlation of work and on their report was disapproved by the House. This recommendation proposed a special committee to study and support legislation providing for a Commission on Ethics in Government and to counsel with any such Commission as might be established. Instead of a Special Committee this function was referred back to the Section for further study and report.

Two bills—H.R. 8075 and H.R. 2942—referred to this Committee for study are only tangential to the basic reference and have not been given extended consideration.

H.R. 2942 proposes an amendment to the Hatch Act to exempt from its application officers and employees whose primary function or one of whose major functions relates to administration of any employee loyalty or security program. Assuming political activity is a phase of ethical conduct the question seems pertinent, what relation does administration of an employee loyalty or security program bear to political activity calling for greater freedom to engage in partisan political pursuits prohibited by the Hatch Act?

H.R. 8075 proposes granting to persons in the competitive civil service the right to a hearing before removal or suspension without pay and a subsequent judicial review of any such action. Insofar as violation of a regulation prescribing a code of ethical conduct may be ground for the disciplinary action of suspension or removal, the procedure by which such action is accomplished is an important consideration. The objective of this bill has certain merit as a matter of principle but the specific proposal requires extended study in a context of procedural aspects of employee rights rather than the content or feasability of a Code of Ethics for Government employees.

Three bills are definitely within the frame of reference as efforts toward establishment of a code of official conduct for Government Employees. House Concurrent Resolutions 2 and 10, Jan. 3, 1953 purport to express the sense of Congress that a prescribed Code of Ethics should be adhered to by all Government employees. The substance of the Code set forth in each resolution is practically the same and each is quite brief. House Concurrent Resolution 2 speaks in the first person while House Concurrent Resolution 10 speaks in the third. Neither provides any sanction or machinery for enforcement. The Code proposed in House Concurrent Resolution 2 is as follows:

> "1. At all times, I will consider public office as a public trust.
>
> 2. I will uphold and obey the Constitution and all laws and regulations of the United States and all governments therein.
>
> 3. Mindful of my obligation to those I serve, I will give a full day's labor for a full day's pay, seeking always to find more efficient and economical ways of performing my task.
>
> 4. I will never discriminate unfairly by dispensing special favors or privileges to anyone, whether for compensation or not, nor accept favors or benefits from any person that might influence me in the performance of my duties.
>
> 5. I will pledge my best efforts to expose corruption wherever it may ex-

ist in public life, and to bring about universal acceptance of the principle that nothing is politically right that is morally wrong.

6. I will never take advantage of my position or use any information available to me because of my public position, for private profit or selfish gain.

7. I pledge my best efforts to influence my associates in the public service to observe the principles of this code."

Senate Bill 3142 introduced on March 16, 1954 by Senators Douglas, Humphrey and Morse is a comprehensive attempt to define and provide for enforcement of standards of ethical conduct in Government and embodies the substance of several separate bills proposed in the last Congress. Title I declares as policy the purpose of strengthening the faith and confidence of the American people in their Government by promoting high moral standards in the conduct of Government by establishing (1) a Commission to study and recommend methods of improving such standards, and (2) certain rules and requirements with respect to the conduct of Government officials and employees and other individuals dealing with the Government. Title II provides for creation of a Commission, bipartisan in political make-up and representative of the executive and legislative branches of Government and members of the public from private life. This Commission would be required to study and investigate moral standards of official conduct of Government employees of the United States and the interrelation of moral standards and conduct in business and political affairs with those prevalent in Government and of society in general insofar as the conduct of public affairs may be affected thereby. A final report with recommendations is called for within two years with interim recommendations as may be appropriate. Titles III and IV establish separate detailed codes for the Executive and Legislative Branches and provide sanctions and machinery for enforcement by consequences applicable to employees and those private citizens who may violate the code in dealing with employees.

Title V requires a full report of personal financial status and transactions by employees in any branch of the Government receiving salaries at the rate of $10,000 or more per annum or holding positions of GS-15 or above.

While approving fully Title I and II of S. 3142, the Committee feels that approval of Title III and IV in principle can be recommended but that Title V requiring submission of financial statements from high level employees calls for further deliberation and study as to the efficacy and desirability of such a requirement.

The Committee recognizes the obvious necessity for a high standard of ethical conduct in public service and the need for improved understanding of what course of conduct may be demanded by ethical considerations under given circumstances. On the other hand, as in any fiduciary relation, formulation of precise rules to cover the infinite variety of practical situations is most difficult. Some basic considerations are obvious, others involve exercise of judgment and weighing of essentially subjective or at least subtle factors. No legislation or sanctions can substitute rules for ordinary

common sense and personal moral responsibility beyond the range of effective legal action. The public and public employees are entitled to the clearest definition of which this subject is capable in any Code to be adopted and administered. Perhaps the Code could best be drawn after the Commission contemplated by S. 3142 has made its study and recommendation. Any action by the A. B. A. or any of its components should take note of and encourage efforts toward self-discipline or formulation of proper standards from experience by Government Employee professional groups. The Federal Bar Association has been active in this field for several years and a copy of the Code of Ethics for Government Lawyers, adopted and promulgated by the Federal Bar Association, is enclosed with this report.

The Committee proposes the following resolution:

> "Resolved, (a) That the American Bar Association disapprove S. 3142, 83rd Congress, in the form in which it was introduced; (b) that the American Bar Association approves and recommends the enactment of Titles I and II thereof to establish a Commission on Ethics in Government, empowered to conduct hearings, study applicable laws, make specific recommendations concerning the improvement and maintenance at a high level, of the moral standards of official conduct of elective and appointive officials, officers and employees of the United States; (c) that the American Bar Association approves in principle the substance of Titles III and IV of said S. 3142; (d) That the House of Delegates authorizes the President of the American Bar Association to appoint a Special Committee of the Association on Standards of Ethical Conduct for Public Officials for the purpose of supporting legislation providing for the establishment of a Commission on ethics in Government, and of counseling with any such Commission as may be so established; (e) As an alternative to (d) above—That the American Bar Association refer to the Committee on Civil Service the function and authority set forth in said paragraph (d) above.

Respectfully submitted,

COMMITTEE ON A CODE OF CONDUCT FOR GOVERNMENT EMPLOYEES

Herbert Slaughter
Theodore Haas
William L. Ellis
John A. McIntire, Chairman
/s/ John A. McIntire

## COMMITTEE ON COMMUNICATIONS

This report, following the pattern of its predecessors, will deal only with the past year's procedural developments of an administrative and judicial nature affecting the Federal Communications Commission (and in a separate report, with matters affecting the Post Office Department). It does not cover or include matters of substance and legislation which fall within the purview of the Standing Committee on Communications of the Association.

### I. *PRELIMINARY STATEMENT*

The Federal Communications Commission in the year July 1953 to July 1954 has for the most part continued procedurally along

the paths marked out by it in the previous year which had begun with the lifting of the television "freeze" and the recommencement of Commission processing of applications for new television stations. The Commission's initial and often novel procedural steps in the year 1952-3, together with some analysis of the merits and basis thereof, have been set forth in this Committee's prior Report of August 7, 1953. The early procedural determinations there discussed were the seeds; the past year has seen the emergence of some of the fruit. They will here be examined in some detail. For the volume as well as the far-reaching nature of these procedural developments at the Federal Communications Commission, seemingly unparalleled at any other administrative agency in past years, makes them of unique concern to all those interested and active in the evolution of sound administrative law.

## II. *THE PROCESSING OF APPLICATIONS FOR LICENSE*

a. The practical pressures working on the Federal Communications Commission for the early grant of television authorizations (described in the Report of August 7, 1953) continued at a high pitch during the past year. Such pressures as were removed because of the Commission's issuance of more than 450 TV construction permits since July 1952 were substantially replaced by the fact that the frequencies recently involved were of the choicest variety, i.e., VHF channels in major markets. To bring about service on these channels "at the earliest possible date," the Commission in 1953-4 maintained, and on occasion even extended, the protection against further competition afforded pending applications which became uncontested and available for grant as the result of dismissals of competing applications.

It had previously determined that upon such dismissal, the remaining uncontested application would be retained in hearing status, whether or not it had received administrative processing prior to hearing which found it to meet minimum licensee qualifications. (*In re Woodruff, Inc.*, 9 Pike and Fischer *Radio Regulation* (RR) 385 (1953); *In re John Poole Broadcasting Co.*, 9 RR 387 (1953)) Soon after, the Commission extended such "umbrella" protection to a situation of a proposed merger of applicants in which the dismissing applicant, as consideration for such dismissal, received an option to purchase 49% of the stock of the remaining applicant within thirty days after the latter obtained its grant. (*Head of the Lakes Broadcasting Company*, 9 RR 801 (1953)) Applying its thirty-day cut-off rule[1] to bar a third applicant seeking comparative consideration on that same channel, the Commission there held that the option agreement and resultant dismissal of the application had not had such a "substantial effect" upon the hearing issues as

[1] Section 1.387(b) of the Commission's Rules reads in applicable part as follows:

"(b) The Commission will on its own motion name as parties to the hearing: . . .

(3) Any person who, prior to the time the application in question was designated for hearing, had filed with the Commission a mutually exclusive application . . . at least 30 days before the date on which the hearing on the prior application or applications is scheduled. . . . If the application is filed after the 30-day period, it will be dismissed without prejudice and will be eligible for refiling only after a decision is rendered by the Commission with respect to the application or applications designated for hearing or after such applications are dismissed or removed from hearing."

required by its Rule 1.365(b)[2] for removal of applications from hearing status, inasmuch as the merger agreement was prospective and effected no present changes in the application left in hearing. It so determined in the face of its admission that two hearing issues had been rendered moot by the dismissal, including the one under which comparative evaluation of the two competing applications was originally to be had.

b. The rule of these cases has been followed in a number of subsequent instances. Thus, in *Milwaukee Area Telecasting Corp.*, 10 RR (1954), in which four competing applicants merged under an agreement whereby the remaining applicant would have only 30% of the stock of the new corporation to be formed, and the other three dismissing applicants would have 30%, 30%, and 10% respectively, the Commission held that the amendment to the remaining application to reflect this agreement was not a new application within the purview of the 30-day cut-off rule (Section 1.387(b)(3)) to require its comparative consideration with a new competing application.[3] It did so on the same basis that "the law does not confer upon optionees the rights and privileges enjoyed by stockholders and those holding existing corporate interests" (at p. 688). See also *American Television Co., Inc.*, 10 RR 594 (1954).[4] In view of such decisions, the questions arise as to whether there could be such a creature as a "new" application upon a merger of the old and whether one will ever be found to exist. Furthermore, it would seem that the Commission's reliance upon the "prospective" nature of the merger is highly artificial and unrealistic; the Commission's approval, with full knowledge of the arrangements, of the dismissals which are contingent upon such a merger has bound it practically, if not legally, to approve the merged applicant

[2] Section 1.365(b) provides that: (Amendments of Applications)

"(b) When leave to amend has been granted after an application has been designated for hearing, the application will not be removed from the hearing docket unless the Motions Commissioner shall determine that the proposed amendment substantially affects the issues upon which the application has been designated for hearing and orders that the application shall be removed from the hearing docket. An amended application which has been removed from the hearing docket will be reexamined by the Commission and when necessary will be redesignated for hearing at a subsequent time."

[3] An earlier case in which an operating UHF station was permitted to become an applicant in a comparative proceeding for a VHF channel following a stay ordered on such hearing by the Court of Appeals of the District of Columbia (*Broadcast House, Inc.* v. *F.C.C.*, Case #12040), was here distinguished by the Commission on grounds that Broadcast House had timely filed its application prior to the operation of the cut-off rule. It should be noted, however, that the competing application in the *Milwaukee Area Telecasting Corp.* case was filed on the same day as the merger agreement which had effected such a substantial change in the applicant UHF station's economic prospects and interests.

[4] For a somewhat different but striking instance of such "quick" grant, see *Columbus Broadcasting Co., Inc.*, 9 RR 914 (1953), in which a new, merged application was considered and granted at Commission meeting the very next day after its filing, despite telegraphic protests by local public officials that such grant would create a grave problem of monopoly of mass communications media in the region and requesting to be heard thereon. Refusing to delay its action, the Commission referred to complainants' opportunity to file a verified statement to be considered under Rule 1.726(c) permitting the setting aside of any Commission action within 20 days after public notice of it. Similar emphasis on the early advent of TV service was manifested in the denial of what was deemed a "self-serving" petition for rehearing of a grant after dismissal of competing applications, the Commission emphasizing that the challenged application had been on file for more than 18 months without any questions being raised with respect to it. *Tulsa Broadcasting Company* (Docket 10836, FCC 54-864, July 9, 1954)

corporation thereafter formed. Whatever its disclaimer, it is doubtful if the Commission could or would deny a subsequent applicant for assignment of license to the new corporation and, indeed, there is no record of any such denial to this time.

c. The practical effect of these procedural determinations, i.e., the initiation of VHF service in certain cities sooner than otherwise and previously anticipated, has left its heavy mark upon the operators of UHF stations in the same communities and areas. For it is clear that such UHF operators, at least as a substantial part of the myriad complex of factors supporting their competitive commercial activity, had relied upon the "head start" promised UHF by long fights over VHF channels to offset the considerable disadvantages suffered by the newly-opened UHF frequencies.[5] It is this reason which has prompted Commissioner Hennock, disputing the Commission's basic assumption that an amalgam of individually qualified applicants is *ipso facto* a qualified applicant, to call for hearings on the merged application (Ibid., p. 597) and has led to other proposals before Congress to halt this Commission procedure upon mergers, or even to suspend the further issuance of VHF grants altogether.

d. Also in this area of application processing and hearing, the Commission on February 5, 1954 withdrew its pending proposed rule-making proceeding looking toward the amendment of Sections 1.304, 1.382, and 1.387 whereby television applicants were to have been required to publish notice in the local community of the filing of their applications and whereby competing applications would be barred after 30 days of such publication. No reason was given for the Commission's withdrawal of this proposal, although as has previously been noted, the amendment was at the very least poorly timed in view of the large numbers of TV applications already granted by the Commission. And finally, on July 1, 1954 the Commission announced certain minor revisions in its Form 301 (Application for Authority to Construct or Modify a New Broadcast Station) and other of its application forms (303, 314 and 315, respectively for Renewal of License, Consent to Assignment of CP or License, and Consent to Transfer of Control) which contain sections identical with those being modified in the Form 301, said changes to be effective July 31, 1954.

## *III. THE "PROTEST" PROCEDURES OF SECTION 309(c) OF THE COMMUNICATIONS ACT*

a. The Commission continued during the past year to experience difficulty in its construction and application of the protest procedures of Section 309(c) incorporated into the Communications Act by the McFarland Act amendments of 1952.[6] The inconsistency that characterized its earlier decisions

[5] Clearly, this is not the time nor place even to approach our TV system's primary stumbling-block at present, i.e., the salvage and healthy development of the UHF. It is sufficient to note here the demonstration of the profound substantive effects which may be caused by seemingly unrelated procedural developments. Another instance of the same phenomenon is found in the Commission's revision of its television processing procedures to eliminate the priorities previously afforded UHF applications. 9 RR 1543, 1555.

[6] The Commission was afforded 30 days to act upon protests, rather than the 15 days previously specified, by an amendment to 309(c) approved March 26, 1954.

was again manifested, and again so with respect to both of the statutory jurisdictional requirements, i.e., (a) that protestant be a "party in interest" and (b) that it "specify with particularity the facts, matters and things relied upon . . ." It might be generalized that the Commission has grown more lenient in its application of the former requirement and more restrictive in applying the latter. But no generalization, as shown hereinbelow, could be stretched to harmonize fully the various Commission decisions on these matters.

b. Perhaps the furthest reaching decision respecting Section 309(c) came with the extension of the "party in interest" concept to include a newspaper publisher protesting the grant of a TV station which would compete with the newspaper for advertising revenues in the city and general area. *Ohio Valley Broadcasting Corp.*, 10 RR 452 (1954). Reviewing the history of Section 309(c), the Commission in a 4-3 decision stated that:

> "We cannot find any indication that Congress intended to restrict the relief afforded by Section 309(c) to licensees or permittees of the Commission. The test provided by the Sander's decision is one of direct competitive injury which gives 'standing' without reaching the level of injury to a legal right . . . (It) is equally applicable . . . to such injury caused by the grant . . . to a competing medium of expression which also relies upon advertising as its main source of revenue." (Ibid., pp. 455-6, footnotes omitted.)

The rationale of this decision is in marked contrast to an earlier denial of a protest of a taxicab company (alleging it would suffer substantial and direct financial injury therefrom) against the grant to a competing cab company of a CP for a radio station in the Taxicab Radio Service on grounds that:

> "The alleged injury stems primarily from the fact that the two companies are in a competing business rather than from the grant of this auxiliary radio station license. As such, it is considered to be too remote and not within the scope of either the Sander's case or Section 309(c)." *Yellow Cab Company of Chicago, Illinois*, 9 RR 122a, 123 (1953).

It would appear that the Commission once burned by being required to overrule its earlier too-restrictive decision which had held an AM station in the same community not to be a "party in interest" (*Verslius Radio & Television, Inc.*, 9 RR 102, 104) has now run the gamut to the opposite extreme of liberality in its interpretations of 309(c) respecting competing media.

c. Yet in *Spartan Radiocasting Company*, 10 RR 287, 587 and FCC 54-804, July 2, 1954, the Commission denied protests by UHF television stations in nearby cities directed against grants of applications for special temporary authority and thereafter for modification of license of a VHF television permittee in Spartanburg, South Carolina which, respectively, authorized the latter first temporarily and then permanently to change its transmitter site and to place a signal of stronger intensity (and thus better service) over the cities in which the former were located. The Commission held that inasmuch as the original grant of the latter's VHF construction permit had not been protested, the protestants could not be "parties in interest" under

Section 309(c) except insofar as a finding of new injury from the modification of CP itself could be made; such facts not being shown and the injuries complained of stemming primarily from the original grant and not reasonably being shown to be a direct and proximate consequence of the authorizations under protest, the protests were denied.[7] This case was distinguished from *Midwest Television, Inc.*, 9 RR 611 (1953) in which a protest had been granted when the site change resulted in a signal of "principal city" strength being cast for the first time over a city 42 miles away; here a signal of such strength was given by the original permit as well as by its modification. To the same effect as the *Spartan* case, see *Channel 16 of Rhode Island, Inc.*, 10 RR 377 (1954), where protests against an extension of time to construct a TV station under a construction permit and a grant of an STA for commercial operation were denied.

d. The past year likewise brought no definitive standard nor any serious change with respect to the Commission's pattern of inconsistency in applying the second jurisdictional requirement of Section 309(c), i.e., that the facts and charges relied on be spelled out with specificity. Thus in *Ohio Valley Broadcasting Corp.* the protest was granted despite the absence of particularity as to anticipated injuries since "The cause and nature of the alleged injury has been specifically set forth in the context of a competitive situation where the action taken by the Commission clearly disrupts the existing competitive picture." Inasmuch as the new TV station "will be in direct competition for the same advertising this is not that type of situation where the Commission's action could not be expected to result in a substantial competitive change and where, as a consequence, a more precise showing must be required." (Supra, p. 456) Yet in *Patroon Broadcasting Co., Inc.*, 9 RR 638 (1953), the Commission denied a protest by an AM station against TV grants in the same and neighboring cities to companies already holding AM licenses for the reason that protestant had failed to meet the specificity requirement with respect to its charge of economic injuries it would suffer as one of the two AM stations in those cities without any television affiliation. It is, however, quite difficult to perceive any sound basis for assumption of injury from a new TV station to a newspaper and not to an AM station in the same city. See also *WHEC, Inc.*, 9 RR 172, 174a (1953), and *Cherry & Webb Broadcasting Company*, 9 RR 1093, 1094 (1953), the latter involving a granted protest in which the Commission's decision referred to but did not set forth "certain specified economic factors" supporting the charge of injury.

What would appear to be a more reasonably defined limitation on this jurisdictional requirement of specificity was set in *Alvarado Broadcasting Co., Inc. (KOAT)*, 10 RR 381, 384 (1954) in which the Commission denied the protest of an AM sta-

[7] Protestants have appealed to the U. S. Court of Appeals the denial of both protests as well as the grant of the modification of CP. With respect to the STA, the Court having stayed its effectiveness pending a final decision on appeal, applicant thereupon requested its cancellation which request was granted by the Commission, but the Court then denied a Commission motion to dismiss this appeal as moot. The Court later also stayed the effectiveness of the authorization for modification of CP and has recently consolidated these various appeals.

tion against an AM grant in a city 330 miles away, there being no interference to protestant's service area and no showing of any loss to present or anticipated advertising revenues as the result of the grant. On similar grounds, in *J. E. Belknap and Associates* the Commission denied a protest by one of Memphis' television stations (WMCT) against construction permits granted for microwave relay stations designed to pick up TV signals originating in Memphis for delivery to community television distribution systems in two Missouri cities (FCC 54-844, July 8, 1954). The Commission held that the protestant's assertions that the authorizations would cause it injury were grounded upon the unsupported assumption that the permittee would operate illegally in invading the stations' property rights in its telecasts and so were "remote, conjectural and speculative."

e. With respect to recent protests granted by it against television authorizations, the Commission has continued to afford some protestants a hearing consisting only of an oral argument before it *en banc*, rather than a "full" evidentiary hearing which would appear to be called for by Section 309(c). *Ohio Valley Broadcasting Corp.*, 10 RR 500 (1954); see also *Music Broadcasting Co. (WGRD)*, 10 RR 554 (1954).[8] For example, the aforesaid *Ohio Valley* decision was based upon the Commission's conclusion that the "issues are not designed to elicit facts but rather seek a final determination based on interpretation of law and policy" (p. 502). Yet, as pointed out in detail in the forceful dissent of Commissioner Hennock, those issues there dealing with Section 3.636 of the Commission's Rules concerning multiple ownership of facilities,[9] an alleged monopoly of mass media of communications in the area to be served and whether payment by permittee of certain sums to the dismissing applicant were in the public interest, clearly seem to call for the introduction of evidence and cross-examination in a trial-type hearing.

It may well be that the Commission, unconvinced as to the value of the protest procedures, particularly in light of the heavy pressures it faces for quick TV grants, yet feeling obligated by its interpretation of Section 309(c) to grant a protest, thereafter seeks to minimize the protest's effect upon the early establishment of TV service by affording only a limited and almost cursory hearing to protestant. To minimize, however, is also to nullify; what

[8] In *Cherry & Webb Broadcasting Co.*, 10 RR 181, 183 (1954), the Commission assigned only the factual issues in a protest hearing to an Examiner but reserved for itself the determination of the legal issues to be based upon the Examiner's findings of fact (without conclusions of law), the record certified by said Examiner, and oral argument thereon before the Commission *en banc*.

[9] Section 3.636 provides in pertinent part that:

"Multiple ownership—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control if

(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question . . ."

Congress giveth, the Commission taketh away. For it must be clear that the worth of the protest procedure is determined in direct proportion to the procedural safeguards it calls forth; to limit hearings on protests to oral arguments is to restrict them to little, if anything, more than Petitions for Reconsideration under Rule 1.390.

f. In this regard, the past year saw the first final decisions by the Commission following protest hearings, including both those in which protestant had been afforded a full, evidentiary hearing before an Examiner (*Verslius Radio & Television, Inc.*, FCC 54-844, July 6, 1954), and those in which only oral argument *en banc* was held before the Commission (*Ohio Valley Broadcasting Corp.*, FCC 54-824, July 2, 1954). In both instances, the Commission found the challenged authorization to have been in the public interest and immediately reactivated their effectiveness, in the former instance affirming an Examiner's Initial Decision to this effect (Supra, 9 RR 1123). And in its *Ohio Valley* decision, it should be noted, the Commission continually rested its conclusions upon its "review of the record," as if said record had been evolved upon a full, evidentiary proceeding with full adversary right of cross-examination, etc., rather than limited to certain assumed facts and oral argument before it.

g. The Commission's adoption of procedures to insure early grants of television authorizations, referred to hereinbefore, has even made itself felt in its interpretations of Section 309(c). Thus, the Commission has denied protests to TV grants made after a merger of competing applications which had been in hearing status but where only pre-hearing conferences had been held without any taking of testimony, the Commission holding that protests do not lie to an application granted after hearing (*Tulsa Broadcasting Co.*, 10 RR 643 (1954), reaffirmed FCC 54-864, July 9, 1954). In this manner, its earlier determinations that merged applications remained in hearing status so as to bar further competing applications has here been extended to remove the basic protection to the public and other interests afforded by the "protest" procedures. See also *KWK, Inc.* (FCC 54-779, released June 22, 1954). Consistency has here confounded itself. At best, there is dubious support for such a construction of 309(c) in its language and legislative history; the provision speaks in terms of grants made either with or without a hearing and makes no reference to hybrid situations of "hearing status" where no "full hearing," elsewhere specifically referred to in Section 309, has been held. Furthermore, the rationale of the *Tulsa Broadcasting Co.* decision seems directly contrary to that adopted by the Commission in cases such as *Niagara Frontier Amusement Corp.*, discussed below, in which the protest provisions of 309(c) have been distniguished by the Commission from those of Section 309(b) dealing with intervention in hearings.

h. In *WHEC, Inc.*, 10 RR 521 (1954), the Commission denied a Petition for Reconsideration of its prior denial of a protest on the basis that Section 309(c) invoked a flat ban on protests beyond the 30-day period depriving the Commission of jurisdiction even to consider "newly found facts" submitted after the period's expira-

tion. Reconsideration was sought on the basis of certain facts set forth in an official Commission Minute granting the protested authorization which, contrary to normal practice, had not been released as a matter of public record until almost four months after the 30-day protest period had run—a delay clearly of the Commission's own making.[10] As shown above, the Commission on a number of occasions has not bound itself to the strict letter of Section 309(c); yet here where a reasonably liberal interpretation seemed called for by both law and equity, the Commission treated 309(c) as an inflexible despot proscribing the requested action. A similarly restrictive interpretation of Section 309(c) has previously been described; see *Ville Platte Broadcasting Co.*, 9 RR 584 (1953).

i. In other decisions concerning 309(c), the Commission held that a protest would not lie against an amendment to an application, it not being an "instrument of authorization," *Arkansas Radio and Equipment Co.*, 9 RR 772 (1953); it has, in *Channel 16 of Rhode Island, Inc.*, denied a protest to an extension of construction permit affording additional time to build a TV station on the basis that such authorization continued an existing competitive situation without change and was not one of those intended by Congress to be subject to protest (supra; reaffirmed FCC 54-847, July 9, 1954); where it granted a protest alleging that a permit for a new radio station unlawfully interfered with and thus modified protestant's AM license, the Commission held the burden of proof to be on protestant under the provision of Section 309(c), *James Gerity, Jr.*, 9 RR 784 (1953); the pre-hearing procedures of Rule 1.841 were held by a Hearing Examiner to be inapplicable to protest hearings inasmuch as the issues therein had been specifically designated by the Commission and no useful purpose would be served by such application, *Cherry & Webb Broadcasting Corp.*, 9 RR 1340 (1953).

When a protest to an AM construction permit had been denied on protestant's failure to demonstrate the electrical interference alleged by it, and the station had then been built, the Commission thereafter refused protestant's later request, based upon new proof of such interference, that the application for license be designated for hearing, *Benton Broadcasting Service (KBBA)*, 9 RR 586 (1953). Application for license under Section 319(c) of the Act, the Commission held,, conferred "no rights to a hearing upon the part of parties in interest such as are conferred by Section 309(c), and 316(a) at the time of issuance of construction permit" (at p. 589). Exercising its discretion under Section 319, the Commission held the grant to be in the public interest without hearing, despite the fact that a hearing would have been necessary had the original protest contained the data subsequently advanced. And in *Verslius Radio & Television, Inc.*, 9 RR 806 (1953) when testimony during a protest hearing on a television permit established

[10] Protestant here charged that the grant had resulted from an illegal Commission procedure insofar as there had been oral reports and recommendations on applications from Commission staff rather than written reports as was the general rule. However, in both this and other cases, it is clear that the Commission is not countenancing what it has termed a "fishing expedition into the mental processes of the Commission," *Cherry & Webb Broadcasting Corp.*, 9 RR 1156, 7 (1953).

permittee's failure to provide the signal required by the TV Standards over the principal city to be served, the Commission granted permittee's application for modification of CP to cure said defect and consolidated said application for hearing in the protest proceeding. Inasmuch as the aforesaid defect was not the primary issue in the protest proceeding and noting "the congressional direction to expedite the hearing and determination of protested grants," the Commission held its action would not prejudice or unduly burden protestant (at p. 807).

## IV. *INTERVENTION IN HEARING*

a. The question of parties' right of intervention in comparative proceedings for TV frequencies was another that received significant attention at the Commission in the past year. In the first such case, *Niagara Frontier Amusement Corp.*, 10 RR 39 (1954), the Commission denied a request for intervention in a TV hearing, holding that Section 309(b) of the Act[11] did not automatically confer a right to intervene upon a mere showing of probable economic injury where no statement was made of the nature of the facts proposed to be developed at hearing. Distinguishing between the right of protest under 309(c) and that of intervention under 309(b), despite the use by both sections of the same term "party" or "parties in interest," the Commission stated:

> "In fact, reasonableness would dictate that Congress must not have intended to foreclose the exercise of Commission discretion in this area by making intervention a matter lying within the exclusive discretion of those seeking to become parties. The contrary view would impose a strangling restriction upon the functioning of the administrative process by extending to those most interested in delay for self-serving economic reasons an automatic invitation to delay. To the argument that delay may result from the admittedly mandatory operation of the protest procedure in Section 309(c) it is sufficient to note that Congress, with an awareness of the danger [4] decided that this consideration was outweighed by the public risks involved in permitting such a grant without exploration at hearings to go forward over opposition. But such is not the case here where hearing on the application has already been ordered in the public interest" (supra, pp. 41-2).[12]

b. A similar factor of avoiding opportunity for delay in the development of TV service, it should be pointed out, was originally urged by the Commission as one of its grounds for initially holding an AM station not to be a party in interest under 309(c), a holding (as noted) reversed by it after an appeal was taken to the courts in *Verslius Radio & Television, Inc.*, 9 RR 102, 104, 107 (1953). Furthermore, it seems clear that the Commission's rationale in distinguishing between protest and intervention on the basis of the "exploration

[11] Section 309(b) reads in pertinent part as follows:

> "The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application [designating it for hearing after notice to applicant and other parties in interest of objections to it and consideration of their replies] may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing."

[12] Commission Footnote 4 omitted.

at hearings" of applications afforded under protests, runs directly counter to its decision in *KWK, Inc.*, referred to above, in which a protest was held not to lie to the grant of applications in hearing "status" on which no evidentiary hearing with taking of testimony had been held.

c. In a subsequent intervention matter in which the nature of the facts to be developed at hearing *were* set forth, the Commission permitted a UHF station to intervene in the comparative proceedings to be held on competitive TV applications for a nearby city, treating a pleading filed prior to the setting of the applications for hearing as a petition for intervention. *Independent Television, Inc.*, 10 RR 510 (1954).[13] In another case, applying the principle established in cases such as *Head of the Lakes Broadcasting Company* and *Midwest Television Corp.*, supra in Section II, the Commission denied a request for intervention by a UHF station in a hearing in which all but one of the competing applications had been dismissed pursuant to an agreement of merger, *KWK, Inc.*, 10 RR 489 (1954).

## V. *HEARING AND PRE-HEARING PROCEDURES*

a. Perhaps the most significant, if not the most fruitful, development in the past year at the Commission has concerned the hearing and pre-hearing procedures established by Commission Rule 1.841. Adopted in early 1953 with such high promise, this "noble experiment" in fundamental revision of the administrative process encountered during the past year one difficulty after another, soon floundered on the rocks of stubborn practicality and now stands in serious danger of sinking into an early repeal and oblivion.[14]

For the most part, Rule 1.841 was intended to accomplish the hoped for savings of time, expense, and effort in comparative proceedings by sharpening the "genuine issues" therein and then limiting the hearing and its record to these asserted points of significant difference between the parties, differences which came colloquially to be known as the parties' "points of reliance." To satisfy the obvious need for guidance to Examiners and counsel in application of this somewhat novel concept, the Commission some time later issued its opinion in *In re South Central Broadcasting Corp.*, 9 RR 1035 (1953). Therein, so as to eliminate unnecessary and cumulative evidence at hearings as well as the element of surprise, the Commission stated:

> "The statement of matters relied upon must go beyond mere topical references and must, for each of the suggested points of difference, contain statements of fact which, if subsequently support-

[13] The difficult question may well be raised in the near future as to whether the VHF applicants in such a hearing could merge and secure an uncontested grant over the objections of an intervenor UHF station with status as a party to the proceedings.

[14] Another instance of frustration of an otherwise material procedural improvement is found in the recent resignation of the Commission's Chief Hearing Examiner, appointed only shortly before to a post long vacant to supervise the assignment of cases and coordinate examiner efforts; the press reported the resignation as due to the resistance of some of the Examiners themselves to the carrying out of such duties as impinging upon their judicial independence. (Broadcasting • Telecasting, July 5, 1954)

ed by the evidence, would sustain findings of significant difference between the parties." (p. 1037)

Whatever initial difficulties might ensue in having Examiners require a proper balance in the evolution of points of reliance "between extreme generality and excessive detail" would, the Commission believed, "be a minor obstacle which time, accumulated experience and honest cooperation by all parties can overcome" (p. 1037). It therefore held the abbreviated points of reliance in that case to be inadequate.

b. The solution anticipated by the Commission was not forthcoming; it was to prove the major stumbling-block to the success of the new procedures. Without more specific guideposts from the Commission, there was from the start inconsistent application of this requirement by the several Examiners, e.g., *Brush-Moore Newspapers, Inc.*, 9 RR 922a (1953) and *Radio Station WSOC, Inc.*, 10 RR 353 (1954). Particularly was this true after the Commission, in October of 1953, instituted the requirement that parties to comparative proceedings exchange extensive data in support of their direct cases not later than fifteen days prior to the scheduled date of hearing, data which generally formed the basis for their later points of reliance. (FCC Public Notice 53-1361, October 14, 1953) Contributing to the difficulty was the Commission's failure to take adequate account of counsels' natural resistance in such hotly-contested proceedings to "showing their hands prematurely"; a mere decisional statement that TV hearings were "not a contest for position" could not alone, without specific groundrules generally understood and strictly enforced, effect such a reform in the traditions of advocacy.[15] At no time was there any real assurance as to what was required by way of expressing points of reliance and, more importantly, as to what would be the application of such "points" at hearing in fixing or stabilizing the issues and then limiting the evidence admissable thereunder. Nor was there firm and consistent control of the entire process by Examiners. Thus, counsel played it safe and tended to claim more and more points of reliance with less and less exposition of the support for them.

In fact, the actual refinement of points of reliance in pre-hearing conferences between counsel often proved to take more time and trouble than would have the actual taking of testimony without any "points" (the same being true of argument during hearing as to their force, effect and application). In a number of instances, competing applicants agreed upon generalized points of reliance over the sole objection of the Commission's Broadcast Bureau that greater particularization should be required.

c. In the subsequent decisions of *Biscayne Television Corp.* and *Radio Station WSOC, Inc.*, 10 RR 525 (1954) after oral argument before it *en banc*, upon an appeal by its Broadcast Bureau from an Examiner's acceptance of rather generalized points of reliance, the Commission substantially reversed its earlier *South Central* decision

[15] A seemingly more realistic view of comparative proceedings as "a competition among combatants mature in the business of broadcasting and experienced in the laws, rules and regulations governing broadcasting licensing" has been voiced by an Examiner in *Southern Broadcasting Co., Inc.*, 10 RR 215, 217 (1954).

and took a long step toward complete repeal of this procedural requirement. Refusing to rule on the specific "points" in question before it, the Commission remanded the case to the Examiner "with instructions that he proceed with the hearing" (p. 527).[16] While the purpose of Rule 1.841 as stated "contemplates a fair disclosure of each applicant's case," the Commission recognized that the procedure "does not contemplate a detailed preliminary debate at the hearing conference over evidence to be offered later at the hearing," nor was it "designed to preclude any party from offering evidence at the hearing" in support of what it considers material and significant in establishing its superiority.

d. In view of such determination, it has widely been asserted that there remains little if any reason to continue the required use of points of reliance (See the Separate Views of Commissioner Hennock to this effect, 10 RR 527). As a matter of fact, in its *Biscayne* and *WSOC, Inc.* opinions, the Commission indicated that it was conducting a detailed review of these prehearing procedures. Its conclusions, to be set forth in a revised Rule 1.841, are expected momentarily; while any estimate in this volatile field must of necessity be quite hazardous, there is every indication that the "points of reliance" will be eliminated, in whole or in substantial part. Much less certain is precisely what will take their place in securing the particularization of hearing issues required by the Communications Act, especially Section 309, and sought for by the President's Conference on Administrative Procedure. Nor will their elimination in and of itself solve the continuing questions as to how and when, if ever, parties to a comparative proceeding will be fixed insofar as concerns the issues relied upon and the material evidence in support thereof.[17]

e. While suggested solutions are of great variety, one widely urged would have the Commission enlarge the information required to be furnished in applications for new stations to include all relevant and material data now subsequently exchanged by the parties or generally introduced by them as exhibits and then bind them at hearing to such data without significant change; at the same time, parties would be required to give general notice before hearing only of those "negative points" dealing with deficiencies in opponent's cases which are outside the usual areas of TV comparisons (e.g., misrepresentation to the Commission, activities in restraint of trade, etc.); and the hearing would thereafter proceed along traditional trial lines within the guideposts of competency, relevancy and materiality.

[16] This was done, of course, without change in the already agreed upon generalized points of reliance therein.

[17] Thus, Examiners have generally held in recent cases applying such points of reliance as have been devised, that proof at hearing would be limited to such areas as set out in the "points." *WKRG-TV, Inc.*, 9 RR 965, 968 (1953) And the Commission has upheld an Examiner's denial of a petition for leave to amend an application (to show an option to purchase studio site) pertaining to a matter on which competing applicants had already claimed superiority, holding that Section 1.365(a) pertaining to amendments should be strictly construed after hearing conference, and amendments permitted only upon "an extraordinarily strong set of circumstances," not there shown. *Scripps-Howard Radio, Inc.*, 9 RR 1322a, 1323 (1953). However, in *Wisconsin Broadcasting System, Inc.*, 10 RR 162 (1954), an Examiner permitted an amendment to show the resignation of applicant's officer as being a minor matter even though the other party had relied upon such officer in its "points."

f. Other aims and aspects of the pre-hearing conferences, e.g., possible agreements on stipulations of fact, limitations on cumulative proof, need or desirability of depositions, etc., have proved more acceptable to the parties, achieved some measure of success and so should and likely will be retained in a revised Section 1.841. Without points of reliance, however, the pre-hearing procedures, including the number of conferences, will be materially limited.

g. It remains to be seen whether the Federal Communications Commission's fairly unhappy experience in this area will, even in other less difficult circumstances, tend to depress or channel into more fruitful lines other such attempts at procedural reform in the administrative process as have been contemplated by the 1951 Judicial Conference and the more recent President's Conference on Administrative Procedure.

## VI. *WRITTEN PRESENTATION OF CASES*

a. There was growing emphasis in the past year's hearings upon parties' submission of all, or a large part, of their affirmative case in written form. Certainly the strongest support therefor has been the belief that such procedure is simpler as well as more expeditious than oral presentations of material, much of which is of a pro forma nature. And it seems likely too that this trend will be carried forward, if not accelerated, in any future revision of Section 1.841.

b. Where parties made and were bound by agreement for such presentation, the Examiner in *The Travelers Broadcasting Service Corp.*, 10 RR 604 (1954), held that further oral direct testimony was permissible only when it did not materially change or add to the written evidence already submitted, unless justice would be served thereby and good cause shown for the delay in offering such proof. Thus, oral testimony to establish a witness to be an expert was permitted where objection to his qualifications in that capacity had been made to the introduction of his written exhibits; on the other hand, other oral evidence by new witnesses to support certain written opinion testimony was not permitted. (pp. 611, 612)

c. The *Travelers* decision appears only to begin to hint at this type of difficulty when all or substantial part of a case is submitted in written form. To counsels' endless haggling over words and phrases, sentences and paragraphs of the written exhibits, as well as the extent of changes in each required by any broad evidentiary ruling, must be added such difficulties as the substantial loss in hearings of the "credibility" factor as well as the personal appearance and presentation of applicants' principals, which are so important to licensee qualifications, the "canning" of testimony in counsels' offices, the substitution of the literary ability of hired temporary consultants for the knowledge of principals, etc. The past year's hearings seem only to have strongly reaffirmed the relative undesirability of presentations of testimony in writing beyond the area traditionally served by the presentation of exhibits to supplement oral evidence. Such difficulties as were anticipated from written pres-

entations have proved all the more dangerous and difficult in practice than they were in theory. While the contrary view has its many adherents and perhaps certain advantages (although this is by no means clearly established) it remains pertinent to inquire as to the ultimate wisdom of sacrificing traditional and valuable legal methods for the expediencies of the moment. Particularly so when it has nowhere been shown that the traditional procedures for presenting evidence, under the firm guidance of the presiding officer, could not just as well or better meet the public interest for an expeditious determination and at the same time also maintain the paramount public interest for a full and fair hearing.

## VII. *LITIGATION ON PROCEDURAL MATTERS*

The past year has also seen a significant volume of judicial review by the U. S. Court of Appeals (District of Columbia Circuit) of procedural determinations made by the Commission since the lifting of the "freeze." The decisions are reported below in summary form, time and space not here permitting more extended discussion of their issues and merits.

In *Logansport Broadcasting Corp.* v. *United States,* 210 F.2d 24, 10 RR 2008 (1954), in upholding the general legality of the Commission's nationwide television allocations plan, the Court held that the Commission had statutory power to allocate frequencies to cities by rule-making *or* upon specific applications and was not restricted to the latter method.[18] In addition and incident thereto, the Court ruled that the allocations proceeding which resulted in the plan was rule-making in nature and not transformed into adjudication (in which case formal findings and conclusions would have been required) merely because the rule adopted might be determinative of specific future situations; that the Commission's final Sixth Report and Order, in considering all relevant evidence properly before it, had met the requirements of Section 4(b) of the Administrative Procedure Act and was not required to discuss every particular bit of evidence submitted; and that Section 4(a) of the A.P.A. required only a description of subjects and issues involved in the notice of proposed rule-making and did not make further notices and rule-making proceedings necessary each time a new, additional factor was considered by the Commission.

In *Zenith Radio Corp.* v. *F.C.C.,* 211 F.2d 629, 10 RR 2001 (1954), the same Court, reversing the Commission, held that appellant had not waived its rights to comparative hearing on its application for TV Channel 2 in Chicago by failing to appear and participate in (a) a rule-making proceeding (the allocations plan) which here involved a show cause proceeding to substitute the same Channel 2 in place of an authorization for Channel 4 held by an existing station, and (b) transfer and renewal proceedings held respecting the authorization for Channel 4. The Commission could not, said the Court, "by general public

[18] It should be noted, however, that the *Logansport* appeal was taken to a specific portion of the Commission's Sixth Report and Order (FCC 52-294, April 14, 1952) *allocating* TV channels on a nation-wide basis to particular cities, and was not an appeal from the Commission's dismissal of an *application* for a TV channel not set forth in the allocations plan, which would have raised the 307(b) question in its most direct form.

notices in a rule-making proceedings compel a person with an established statutory right [to hearing] to protect that right, against penalty of forfeiture by entering the rule-making proceeding." (p. 633) Similarly, appellant could have but was not required to participate in the renewal and transfer proceedings on another channel in which it had expressed no interest. No clear and intentional waiver being shown, and in fact other pleadings expressly negativing such showing, applicant could not be deprived of its statutory right to adjudicatory hearing on its application.

In *Peoples Broadcasting Co.* v. *United States,* 209 F.2d 286, 288, 9 RR 2045 (1953), the Court upheld the Commission's power under Section 316(a) of the Act to modify a station license without the licensee's application therefor having been made. The express provisions of Section 308(a) requiring such an application for modification should be disregarded, the Court held, mainly because to make modifications "entirely dependent upon the wishes of existing licensees" would nullify a large part of the Commission's regulatory powers. Based upon such conclusion, the Court then sustained the Commission's grant of a temporary, conditional authorization to an existing station (WGAL) to operate on Channel 8 which was, as the result of the new, nation-wide TV allocations plan, being assigned to the city of Lancaster while Channel 4 on which WGAL had previously operated was being deleted therefrom, said grant having been made over the objection of appellant as depriving it of the full and fair comparative hearing under Section 309(c) of the Act on its competing application for Channel 8.

The Court minimized the disadvantages faced by appellant in a comparative proceeding against an applicant already in operation on the new Channel 8; it pointed to the difficulties inherent in such situations of competing against an existing licensee, the expressedly "temporary" nature of the grant, its provision for limited power [19] and the Commission's declaration that it would in comparative consideration give no effect to WGAL's expenditure of funds to operate on Channel 8.

In *Columbia Broadcasting System, Inc.* v. *F.C.C.,* 211 F.2d 644, 10 RR 2021 (1954), intervenor Poole had obtained a construction permit for an AM station (KBIG), built the station and received program test authority for its operation pending final Commission action on its application for license, all six months before CBS's showing of interference from KBIG to its station KMPC and its charge that such interference had resulted in improperly modifying KMPC's license without the hearing required by Section 316(a) of the Act. Finding that a prima facie showing of objectionable interference had been made, the Commission had set KBIG's application for license for hearing under Section 319(c) of the Act to determine if eliminating such interference was in the public interest; it denied, however, CBS's request that KBIG's program test authority be revoked or its power reduced during the pendency of the hearing.

On appeal by CBS, the Court determined that Section 319(c) and not 316(a) was

[19] Such operation, it should be noted however, was for a power far in excess of that authorized to and used by WGAL on Channel 4.

applicable in the circumstances and sustained the Commission's refusal of, what was in essence, CBS's request for interlocutory relief, holding that such relief did not *ipso facto* follow upon the ordering of the hearing and that the Commission had properly exercised its discretion to "refuse to halt operations already in progress pursuant to authorizations made previously in the licensing process." (p. 648)

Preliminary thereto, the Court determined that its jurisdiction of an appeal from the Commission's refusal to revoke program test authority lay under Section 402(a) of the Act and not under 402(b), CBS having filed under each because of uncertainty as to which was applicable.

Respectfully submitted,

Arthur W. Scharfeld
Chairman
Committee on Communications

July 13, 1954

(See Supplemental Statement attached hereto.)

## SUPPLEMENTAL STATEMENT TO THE REPORT OF THE COMMITTEE ON COMMUNICATIONS

On July 15, 1954, subsequent to the preparation of the foregoing Report, the Commission issued a Report and Order substantially revising its established pre-hearing and hearing procedures, said revisions (formulated in cooperation with the Federal Communications Bar Association) being effective immediately. (FCC 54-900) The Commission's primary aim was, of course, to "effect economies of time and effort in the disposition of hearing cases" on applications for new broadcast stations, but it sought as well to extricate the entire hearing process from the cul-de-sac into which it had fallen, as described hereinabove.

The most significant modification adopted was the requirement that parties henceforth exchange what is termed "their entire direct [i.e., affirmative] cases in final written form," at least 20 days prior to the commencement of hearing. (new Rule 1.841) Included therein will be all exhibits (which may be in testimony form), "describing the proposals advanced by applicant . . . which it deems necessary for the establishment of that case" and its superiority. (Report and Order, Paragraphs 8, 9) Through submission of such exhibits setting forth what they consider to be their strongest points, applicants are themselves to delineate their areas of significant difference. Despite language to the effect that the "entire" direct case will be in writing, the Commission contemplates oral testimony with respect thereto, but only in "explanation" or "qualification" of exchanged exhibits, or to replace written material deemed inadmissible on grounds of form or competency, but not in "amplification" of such exhibits.

The Commission, as anticipated, has eliminated entirely the points of reliance applicants were required to exchange. Also dispensed with was applicants' pre-hearing exchange of certain supplementary information specified by the Commission. Provision for hearing conferences has been modified to require at least one conference

both prior to and subsequent to the exchange of exhibits, all looking toward limitation of the issues and the proof to be adduced in support thereof. (new Rules 1.813, 1.841(c)) Finally, in order to provide more time for preparation of the exhibits, the Commission enlarged to 60 days the time interval ordinarily given between the designation of an application for hearing and the commencement thereof (new Rule 1.387(a)), and accordingly revised its Rules 1.387(b)(3) and 1.724(b) to require competing broadcast applications to be filed at least 60 days prior to the commencement of hearing in order to be afforded comparative consideration.

Experience in their application will, of course, be the ultimate determinant of the value of the revised pre-hearing and hearing procedures. Yet, notwithstanding the lack of time necessary for the thorough digestion and analysis of these new procedures, certain disadvantages in them are even now apparent.

The problems raised by emphasis upon presenting cases in writing has already been adverted to hereinabove. So has the need for particularizing and fixing *all* issues in hearing as well as the evidence thereunder, a matter the Commission has seemingly overlooked in large part. Thus, contests over testimony will henceforth turn on the novel question of what is "explanation" of a written exhibit as against its "amplification," while the unfixed and ambiguous nature of this limitation offers a further opportunity for one party to gain an inequitable advantage at hearing over the other. Moreover, the revisions appear to deal solely with the issues (and evidence) concerning an applicant's direct, affirmative case in support of its application, matters generally anticipated by all parties and usually placed squarely in conflict by their exhibits and other evidence. The revisions leave untouched, however, the issues in hearing of a so-called "negative" character dealing with an opponent's deficiencies (e.g., activities in restraint of trade, misrepresentations, etc.) which, while somewhat less conventional, have played a major role in almost every TV hearing to date.

There being no requirement for specification, much less particularization, of such issues in advance of hearings, they may well be sprung at hearings on completely surprised applicants with consequent unfairness as well as delays in the presentation of the case. While new Rules 1.813 and 1.841(c) look toward a narrowing of issues in pre-hearing conferences, it is doubtful that they will be utilized by Examiners to remedy this difficulty. Particularly is this true in the absence of any definite requirement for specifying issues of this type and in view of the previous difficulties had in equitably enforcing such a definite requirement even when it did exist as such under the points of reliance system.

Therefore, at least in these respects, it is seen that the Commission's new procedures effect a retreat to a position further back than that taken prior to the establishment of the points of reliance system and as such are in derogation of the requirements of Section 309 of the Communications Act and the major aim of the President's Conference of Administrative Procedure to secure greater particularization of the issues, as well as substantially elimi-

nate the element of bold surprise at hearings.

In any event, it remains to be seen if the costs to the public interest as may result from the new procedures outweigh such gains as the Commission anticipates in expediting the hearing process. And, whatever this ultimate balance, it is to be hoped that, in the interim, proceedings before the Commission may (with its continuing guidance) be governed by an equitable and consistent application of these new procedures, rather than by fortuitous, personal factors such as what Examiner is conducting the hearings and the extent to which his individual, unguided interpretation of these rules does or does not coincide with that of the respective counsel for the applicants.

Respectfully submitted,

Arthur W. Scharfeld,

Chairman, Committee on Communications
July 16, 1954

## SEPARATE REPORT OF THE COMMITTEE ON COMMUNICATIONS RESPECTING POST OFFICE MATTERS

As Vice Chairman of Post Office Department matters of your Committee, I submit the following report on proposed legislation:

H.R. 569, introduced by Representative Rees, January 3, 1953, by request of the Postmaster General, was considered by the Committee on Post Office and Civil Service and a report (No. 850) was submitted recommending its passage. It passed the House of Representatives on April 8, 1954, and is now pending before the Senate Committee on Post Office and Civil Service.

The Bill provides that when it shall appear to the Postmaster General reasonable and necessary for the protection of the public, or to be in the public interest, the Postmaster is authorized to impound mail addressed to any person, firm, corporation, company, partnership, or association, upon the institution of proceedings before the Postmaster General against any such persons for the purpose of determining whether any of the orders should be issued, as authorized by Section 3 of the Act of March 2, 1889 (39 U.S.C., sec. 255), sections 3929 and 4041 of the Revised Statutes, as amended (39 U.S.C., secs. 259 and 732) and the Act of August 1, 1950 (39 U.S.C., sec. 259a). These several statutes deal with the power of the Postmaster General to bar use of the mails to any person, company, corporation, partnership, or association, using the mails for the sale of obscene matter, or to conduct a lottery or fraudulent enterprise, and under H.R. 569 the impounding order could be issued without administrative hearing.

The House Committee held no hearings on the Bill but stated in its report that under a proviso in the Bill, any person whose mail is impounded in a pending proceeding before the Post Office Department may apply to a United States district court to enjoin the enforcement of the impounding of the mail by showing that the order was capriciously, or improvidently issued, and is not necessary for the protection of the public or in the public interest. Upon

filing of such a complaint the court is directed to hear the matter upon not less than five days' notice.

The House Committee Report further stated that the proviso was recommended by the American Bar Association, which approved the legislation with the recommended proviso. This is incorrect and the Chairman of the Section of Administrative Law has so advised Hon. Frank Carlson, Chairman of the Committee on Post Office and Civil Service of the United States Senate, at the same time, pointed out that the Bill would grossly restrict the scope of review of administrative action authorized under section 10 (e)(B) of the Administrative Procedure Act.

H.R. 171 introduced January 3, 1953, by Representative Rees, Chairman, Committee on Post Office and Civil Service, proposes that the Administrative Procedure Act shall not apply to the Post Office Department in the administration and enforcement of section 3 of the Act of March 2, 1889 (39 U.S.C., sec. 255), sections 3929 and 4041 of the Revised Statutes, as amended, (39 U.S.C., secs. 259 and 732), the Act of August 16, 1950 (39 U.S.C., sec. 259a), and sections 1302, 1461, 1463, and 1717 of title 18 of the United States Code.

No hearings have been had or scheduled with reference to H.R. 171. It is understood that the Department is not likely to press for action at this session, if at all, for the reason that S. 18 introduced January 7, 1953, by Senator McCarran to amend the Administrative Procedure Act, and to eliminate certain exemptions therefrom was passed by the Senate on March 6, 1953, and has been pending since that time in the House Committee on the Judiciary.

Very truly yours,

/s/ Wm. I. Denning
Wm. I. Denning
Vice Chairman
Committee on Communications

[The letter of the Section Chairman to Senator Carlson, Chairman, Senate Committee on Post Office and Civil Service, referred to in the report of Mr. Denning, was dated July 1, 1954, and is as follows:]

**H. R. 569, 83d Cong.**

My dear Senator Carlson:

I learned only at the last minute yesterday that the above bill was pending before your Committee and scheduled for hearing at a Committe meeting that afternoon. Due to the shortness of time I was unable to arrange to be present (or arrange for others to be present )on behalf of the American Bar Association with respect to one aspect of the bill which is the concern of this Section. That involves the extent to which the bill would amend the provisions of the Administrative Procedure Act (U.S.C. § 1001, *et seq.*) insofar as they relate to impounding mail in connection with proceedings for fraud, obscenity and lottery orders of the Postmaster General.

In 1950 the American Bar Association (through its House of Delegates, the policy-making agency of the Association), after reciting the long interest which the Association had in the adoption of the Adminis-

trative Procedure Act, adopted the following resolution:

> *"Now, Therefore, Be It Resolved,* That the House of Delegates reaffirms those resolutions and directs that the Section of Administrative Law, as the successor of the prior Special Committee on Administrative Law, by all necessary and proper means including appearances before legislative committees (1) preserve the gains made by the adoption of Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes, and (3) procure the assistance of officers, units, and members of this Association as well as the cooperation of those of state and local bar associations; * * *"

Following the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (relating to deportation proceedings), and *Riss & Co.* v. *U.S.,* 341 U.S. 907 (relating to motor carrier cases in the Interstate Commerce Commission), it ultimately was judicially determined that these proceedings in the Post Office Department whereby an administrative official can suspend the right of certain addressees of mail to receive any mail whatsoever were also subject to the protections accorded by the Administrative Procedure Act. *Cates* v. *Haderlein,* 342 U.S. 804, reversing (C.A. 7th, 1951), 189 F.2d 369. It appears from the report of the Postmaster General that he regards the "procedural steps" required by the Administrative Procedure Act in connection with the issuance of a "protective order" by the Postmaster General to be burdensome, such that if effective policing of the mails is to be undertaken the authority to impound mail proposed by H.R. 569 is necessary. House Rep. No. 850, 83d Cong. While § 12 of the Administrative Procedure Act provides (5 U.S.C. § 1011) that "No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly," and while the proposed bill H.R. 569 does not expressly mention the Administrative Procedure Act as being amended by the authority conferred, still it is manifest from the report of the House Committee that the intention of the proponents is that an administrative official shall have the right, without notice or hearing or opportunity to defend, to impound every bit of mail sent to a particular addressee pending some hearing to be held on the question whether a fraud or like order should issue—a hearing which it is conceded may be much delayed. The American Bar Association's above-expressed views obviously mean that if authority to impound be accorded, the right to issue such an order should be subject to notice, opportunity to be heard, and judicial review under the Administrative Procedure Act, even though (akin to injunctive proceedings before the court pending a full trial of the merits) the Postmaster General provides that such proceedings be greatly expedited.

We call attention to the fact that if the administrative official (the Postmaster General) enters an order, then under the act as passed by the House a court can enjoin enforcement of the order only if the person subject to the order can affirmatively demonstrate both of two things: (1) That the order was issued arbitrarily, capriciously, or improvidently; and (2) that the

order is not necessary for the protection of the public or in the public interest. We point out that this grossly restricts the scope of review of administrative action authorized under the Administrative Procedure Act, Section 10(e)(B), which permits a court to:

> "* * * hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; *or* (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. * * *" (Italics added)

We feel there is no justification for any burdens or restrictions to any extent upon the scope of review mentioned in the Administrative Procedure Act. To the extent that any of the items from (1) to (6), referred to in Section 10(e)(B) above, exist, certainly the administrative official ought to be reversed. And to the extent that he does not commit any of those wrongs to any citizen or other person, they are no burden on him whatever and he has no need to oppose their existence in the law.

Your staff called attention to the fact that a letter (as it was understood by the staff of the Committee and also as obviously was understood by the Committee of the House of Representatives in its report) had been received in the 82d Congress purporting to commit the American Bar Association to support of this measure. The letter referred to, as read by telephone to the undersigned, is one dated May 7, 1952, from Mr. Arthur J. Freund, who then was Chairman of the Section of Criminal Law of the American Bar Association. As read to me, it expressed Mr. Freund's entire sympathy with the general objectives of the bill and his satisfaction with the proposition that the authority of the Post Office Department for control of these matters requires prompt and vigorous action. I do not find in it any expression of any position which I have been able to verify as taken by the American Bar Association through its House of Delegates or Board of Governors (A.B.A. By-laws, Art. XII, Section 1) and without which no report, recommendation or other action "shall be considered as the action of the Association," *id.* Section 2. I have searched in vain for any expression of House of Delegates or Board of Governors' approval of the position stated in the letter referred to. Accordingly, I believe it should be regarded as the expression of Mr. Freund's individual view.

I have expressed the above views under the directions to this Section from the House of Delegates of the American Bar Association to oppose on behalf of the Association any encroachment on the Administrative Procedure Act. I am sending a copy of this letter to the Honorable William J. Jameson, President, and members of the Board of Governors of the American Bar Association and to Mr. Freund, on

the chance that one of them may care to have the matter of this specific bill referred to the House of Delegates for more specific consideration or for consideration on matters other than its effect on the Administrative Procedure Act. Manifestly, the opposition herein expressed is limited to those features of the bill which restrict application of the Administrative Procedure Act, as noted.

Very respectfully yours,

John W. Cragun
Chairman

## COMMITTEE ON COMPTROLLER GENERAL—GENERAL ACCOUNTING OFFICE

The question of the relationship of the Comptroller General and the General Accounting Office to our administrative set-up has not been studied previously by this Section. Accordingly, your committee has had to try to orient itself in an extremely confused and complex aspect of the law, as to which there exists far too little knowledge. As a result, this report can give only some impressions—rather strong ones, to be sure—which must remain subject to change and correction until definitive recommendations for Section and Association action can be arrived at—which will take even further study.

Perhaps most of us know that the Comptroller General publishes a line of decisions—now swollen to 33 volumes. Before the present officer of that name (viz., between 1894 and 1921) there were published decisions of his predecessors, the Comptroller of the Treasury, which in turn run to 27 volumes, and the First and Second Comptroller.[1] But many of us are not aware of the simply astonishing bulk of the opinions of the Comptroller General (of which the printed volumes are only a small part) which occupy an entire library at the magnificent new full-city-block-large building housing the General Accounting Office (or, perhaps we should say, housing a *part* of the General Accounting Office) in the City of Washington. Those decisions—written with all the formality (if frequently little of the judicial detachment) of opinions of the court—are followed as gospel by disbursing and certifying officers of the Government. These unpublished decisions are not even available in index form to the bar—which is permitted to *ask* a librarian if there is a decision on such-and-such a point, and is bound to accept the answer, whatever it may be.

Not so long ago—in 1942, to be specific—at the time of the death of Mr. Justice Sutherland, Mr. Chief Justice Stone said that the views of that former President of the American Bar Association might be summarized by saying that he believed "ill-considered experimentation in government in pursuit of passing fashions in legislation and loose governmental control of adminis-

[1] Before 1894, decisions by the Second Comptroller were not published in permanent form, although three digests thereof were. Seven volumes of decisions by the First Comptroller were published, plus the 27 volumes by the Comptroller of the Treasury mentioned above. Both the Comptroller General and the Comptroller of the Treasury published one volume for each fiscal year, all of which are approximately the same size despite the tremendous growth of Federal activities since 1894.

trative officers would in the end prove to be the real enemies of true democracy." [2]

In 1776 Robert Morris wrote "So long as that respectable body [the Continental Congress] persists in the attempt to execute, as well as to deliberate on their business, it will never be done as it ought, and this has been urged many and many a time by myself and others, but some of them do not like to part with power or to pay others for doing what they cannot do themselves." [3] In Service Monograph No. 46 by Darrell Hevenor Smith,[4] Morris' indictment is characterized as being perhaps too severe because certain members of the Continental Congress "such as Samuel Adams had, in all sincerity, an abiding fear of usurpation of power by the executive or by agents and administrators." [5] So regardless of whether the Congress' reasons in the Eighteenth Century for trying to make and execute its own laws were due to its desire not to part with any of its powers, or to a reluctance to pay others to do that which it could not do itself, or because of an abiding fear of usurpation of powers by administrators, it is apparent that the fears then expressed by the founding fathers are still with us. The approach your committee has taken in its attempt to examine into and report back on its assigned subject, The Comptroller General and The General Accounting Office, has consisted in the main of reviewing those decisions rendered by the agencies which have been the subject of review by courts or quasi-judicial agencies of the Federal Government such as the Contract Settlement Appeal Board established by the Contract Settlement Act of 1944,[6] in order to determine whether or not the General Accounting Office and the Comptroller General are in fact administrative agencies subject to "loose governmental control." In this endeavor your committee has always tried to keep in mind that famous quotation from the celebrated case of *United States* v. *Lee* (1882) 106 U. S. 196, 220, in which it was said:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." [7]

Another premise upon which your committee proceeded was that everyone knows, or should know, that decisions by competent courts having jurisdiction comprise one of the primary sources of the law along with the Constitution, valid treaties and statutes; that the "law" which the Supreme Court in

[2] 65 S. Ct. p. CLXVIII.

[3] The General Accounting Office, Its History, Activities and Organization (Institute for Government Research, Service Monograph No. 46) by Darrell Hevenor Smith (The Johns Hopkins Press, 1927), p. 4, quoting Am. Archives (5th Sess.) III 1236, 1241).

[4] Note 3, *supra*, p. 5.

[5] Note 3, *supra*, p. 5.

[6] See Proceeding No. 51 (1946) 4 CCH 60,171.

[7] See also *Larson Domestic & Foreign Commerce Corp.*, 337 U.S. 689; *Land* v. *Dollar*, 330 U.S. 731; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619, 620; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 576, aff'd. 343 U.S. 579.

the *Lee* case has admonished must be followed by all, is none the less the law because it appears only in court decisions.

The Comptroller General and the General Accounting Office are parts of the legislative branch of the federal government, but as neither is a "legislature" or a "court" they are both administrative agencies of such government.[8] Hence, your committee has satisfied itself that both the office of Comptroller General of the United States and the office which he heads as such, the General Accounting Office, fall within the purview of the Section on Administrative Law, American Bar Association.

Expressed on a percentage basis, there are relatively few of us who ever have any occasion to deal with the Federal Government, if using the mails and paying taxes are excluded. The average citizen, therefore, if he has ever heard of the Comptroller General at all, has probably done so through some reference to his being the "Watchdog of the Treasury" or "Protector of the Public Purse"; therefore the occupant of the position has become *sanctum sanctocrat*[9] and beyond criticism except by those having ulterior motives. So, any published criticism would probably be met in some quarters with about as much appreciation or suspicion as might criticism of a rich but distant uncle from whom the family hoped sometime to inherit. Specifically to illustrate this phase of the matter, if a member of either house of the Congress arrived at the conclusion that either or both the Comptroller General or the General Accounting Office should be stripped of any of their statutory authority, or even be bridled with respect to the manner in which such real or fancied powers were being used, brave or reckless indeed would he be to take the floor and so announce unless he had no desire or hope to be returned to office. Nevertheless your committee believes that there is much to criticize so that many loose practices may be tightened to the end that the public interest will be better served.

From the lawyer's viewpoint the history and development of the accounting officers' position in our government is both interesting and surprising. After more than 150 years of debate on the subject how the Congress could best assure itself that the funds it appropriated were used for the purpose intended, both the office of Comptroller General of the United States and the General Accounting Office, which is under his control and direction, were created by the Budget and Accounting Act of 1921.[10] Before that, numerous other schemes, plans and devices were tried, but for one reason or another they failed to result in the exercise of that degree of control—independent of pressures from the executive branch—which the Congress considered desirable for the public good.[11] With the military services and the numerous other departments, agencies and independent establishments being considered part of the executive branch, it may readily be seen that most expenditures and other financial transactions by the Federal Government occur in that branch.[12]

[8] Davis on Administrative Law, Sec. 1.

[9] In proof of the proposition that Latin is not a dead language.

[10] Act of June 10, 1921, 31 U.S.C. 41, *et seq.*

[11] Service Monograph No. 46, Note 3, *supra.*

[12] See note 25, *post.*

It is your committee's belief that the most imporant power or authority possessed by the Comptroller General and the General Accounting Office is to make certain of their decisions or actions binding upon the executive branch [13] and its employees. Neither possess any such authority with respect to the other two branches, although they have the same duties with respect thereto as they nave the executive branch, namely, to investigate therein "all matters relating to the receipt, disbursement and application of public funds," [14] and to receive and examine all accounts relating to, among others, the judiciary, United States courts, judgments of United States Courts, including those of the Court of Claims, and all accounts of the Senate and House of Representatives.[15]

But before developing the results which flow from this authority to make certain decisions or actions binding upon the executive branch, another power vested in the General Accounting Office must be mentioned in passing because it is strongly relied upon every day. That is the provision of the Budget and Accounting Act which provides in pertinent part that "all claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [16] Literally read, this of course appears to mean much, but as construed by the Supreme Court it means little.[17] In 1886 that court, after pointing out that this statute was first enacted in 1817, held that "it evidently relates to an entirely different class of duties from that to which the payment of the judgments of the Court of Claims belongs . . . [and confers] . . . no power whatever to go behind the judgment . . ." In respect to decisions made by Executive Officers the Supreme Court held in *United States* v. *Jones* (1855) 18 How. 92, that they were beyond the accounting officers. In the *Globe* case, decided after the Budget and Accounting Act was passed, the same court in speaking of this section of the Act

[13] In pertinent part the act (42 Stat. 24; 31 U.S.C. 44) provides: "The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government." With respect to others the act merely provides: "Said office [General Accounting] shall receive and examine . . . all accounts relating to . . . the judiciary, United States courts, judgments of the United States courts . . . Court of Claims and its judgments . . . Territorial governments, the Senate, the House of Representatives, the Public Printer, Library of Congress, Botanic Garden, and accounts of all boards, commissions and establishments of the Government not within the jurisdiction of any of the executive departments. Said office shall certify the balances arising thereon according to the character of the account, to the Secretary of Senate, Clerk of the House of Representatives, Sergeant at Arms of the House of Representatives, or the chief officer of the . . . commission, board, or establishment concerned." (28 Stat. 206, as amended; 31 U.S.C. 72) With respect to the binding character of balances certified by the General Accounting Office in the executive branch and on its employees, the act as amended now also provides: "Balances certified by the General Accounting Office upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission or establishment not under the jurisdiction of an Executive Department to which the account pertains, or of the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government." (28 Stat. 207, as amended; 31 U.S.C. 74)

[14] 42 Stat. 25; 31 U.S.C. 53.

[15] 42 Stat. 24; 31 U.S.C. 44.

[16] 42 Stat. 24, R.S. 236; 31 U.S.C. 71.

[17] *Globe Indemnity Co.* v. *United States* (1934), 291 U.S. 476; *United States* v. *Jones, Adm'r., etc.*, (1886) 119 U.S. 477.

(R.S. 236) upon which the General Accounting Office places great reliance, said that the statute conferred no new powers on the General Accounting Office not theretofore vested in the Treasury Department.[18] The court said: "Before, as after, department heads or disbursing officers might ask the accounting office to render a decision upon a question involving payments to be made by them, in order to protect the disbursing officers and their bondsmen from liability for a payment unauthorized by law." [19]

Bearing in mind the authority in the Comptroller General to render certain decisions or take actions binding upon the executive branch referred to above, and noting the additional fact that disbursing officers in the executive branch may be held personally liable for funds disbursed by them, and that executive branch certifying officers similarly may be held so liable for expenditures made on the basis of certifications signed by them, which are "false, inaccurate, or misleading," as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved,[20] it may be seen that these provisions *in terrorem* have had the result that both disbursing and certifying officers accord great weight to any decisions or pronouncements of the Comptroller General. To them, and notwithstanding what the courts may have ruled on a matter, all that counts is what the Comptroller General has said or may say.

Apparently recognizing the position in which disbursing officers may find themselves through no fraud or fault of their own, the Congress has expressly granted statutory authority to them (and to heads of the Executive Departments) to submit any question to the Comptroller General before acting. When a decision is rendered the statute provides that the same shall govern the General Accounting Office in settling the account.[21] But no such protective device (assuming such decisions are likewise binding upon the Comptroller General) is accorded certifying officers.[22] However, the Congress has extended to such certifying officers the right to petition the Comptroller General for relief of liability and authorized the Comptroller General to grant the same if the case falls into certain categories which consist mainly of those instances where (1) the certifying officer did not know, or by reasonable diligence could not have ascertained, the actual facts *and* that he relied on official records, or (2) where he acted in good faith *and* the payment was not contrary to "any statutory provision specifically prohibiting payments of the character involved." [23] However, it is most interesting to note that even though the certifying officer requesting relief can satisfy either or both of these alternative

[18] Act of March 3, 1917, 3 Stat. 366.

[19] *Globe* case, note 17, *supra*, p. 480.

[20] 61 Stat. 720, 31 U.S.C. 82 a-1; and 55 Stat. 875, 31 U.S.C. 82c.

[21] 42 Stat. 24, as amended 31 U.S.C. 74.

[22] "Certifying Officers" certify the documents on the basis of which "Disbursing Officers" pay money. See 31 U.S.C. 82a-1 and 82c, mentioning the two classes of officers. Distinctions of this kind—rigidly observed in the executive departments—are of the very essence in the administrative hierarchy. That one *could* be exculpated and the other not, where neither was at fault, by a decision of the Comptroller General surpasses understanding to the uninitiated.

[23] Act of December 29, 1941, 55 Stat. 875, 31 U.S.C. 82c.

statutory standards, the Comptroller General apparently still is not obligated to grant him relief because the statute provides merely that the Comptroller General "may, in his discretion," relieve him of personal responsibility.

Your committee has not attempted to gather any figures regarding the average potential liability thus assumed by disbursing officers or certifying officers,[24] but doubtlessly disbursements made in the executive branch being some fifty billions or more annually, if every single one of the two-million-odd executive branch employees, including messengers, secretaries, watchmen and others, were either disbursing or certifying officers, their individual average potential liability would be about one-half million dollars each year.[25]

Possessing such plenary power over every individual connected with the disbursement of public funds in the executive departments, and the unquestioned effect the Comptroller General has upon the fortune of every payee, where then, one might ask, does he obtain the authority he apparently believes he has to disregard the law as exemplified by court decisions? or treat the same as being merely advisory and not binding upon him? The answer to this, if any there be, is difficult to fathom. Such plenary power appears to be attributable in part to his being independent of the executive branch, yet possessing authority to make decisions binding upon it.

As stated earlier in this report, the duties now charged to the Comptroller General and the General Acounting Office were early placed in the executive branch, specifically in the Treasury Department, after Congress found it could not discharge those duties itself. The officials therein were given various titles from time to time, such as Comptroller of the Treasury, First Comptroller, Second Comptroller, First Auditor, Second Auditor, etc. From time to time, as was to be expected, each made decisions with which the executive branch did not agree. The various Attorney Generals took varying views of the respective positions of the parties to these differences and practices in the various departments within the executive branch were not uniform.[26] In 1855 the Supreme Court had occasion to pass upon the subject and it held in effect that accounting officers could not question decisions made by the heads of the various executive departments.[27] This statement of the law by the Supreme Court was never fully accepted by the accounting officers in the Treasury and in 1856 the Secretary of the Treasury instructed one of the Auditors to apply it only to the particular case and not consider it as changing the law.[28]

Hence, we first find the beginning of the idea that on particular matters pronouncements by the Supreme Court would be fol-

[24] Relief for disbursing officers is obtained from the General Accounting Office, rather than the Comptroller General, but such relief requires that prior specific findings be made by the head of the Executive Branch and appears to grant such office discretionary authority to concur or not concur therein, although the Comptroller General may revise—either way—any final action taken.

[25] The executive branch, exclusive of armed forces, has approximatelv 2,349,000 civilian employees, the legislative fewer than 22.000, and the Judiciary fewer than 4,000. 40 A.B.A. Journal No. 6, p. 486.

[26] House Committee Report, Cong. Record XXVI, p. 4342, *et seq.*

[27] *United States* v. *Jones*, 18 How. 92.

[28] Service Monograph No. 46, Note 3, *supra*, p. 38.

lowed, but they would not necessarily be considered as modifying the law insofar as the accounting officers were concerned. About a dozen years later (viz., 1868) the Congress amended the statute so as to provide that the Act of 1817 should not be construed as authorizing the heads of the executive departments to change or modify balances certified by such accounting officers and specified that the same could only be changed by the Congress itself "or the proper courts."

Nearly 30 years later, in 1894, the Congress passed the Dockery Act [29] and the "proper court's" concept was lost in the changeover. It provided, among other things, that the Comptroller of the Treasury could on his own motion re-examine balances so certified by the other accounting officers, change them if he wished and expressly provided that the actions taken by the Comptroller would be binding upon the executive. It was these duties, functions and powers which were moved over by the Budget and Accounting Act of 1921, along with the others vested in the other accounting officers of the Treasury Department, to the administrative agencies that are the subject of this report.

We even find a special counsel to the Comptroller General writing for publication in the Illinois Law Review a few years thereafter (1925) as follows: "the accounting officers in deciding on the availability of appropriations for the payment of a particular claim either in the accounts of a disbursing officer, on a demand presented by a claimant, or in a decision to the head of an establishment in advance of incurring the obligation or to a disbursing officer, perform a judicial function." [30] The "syllogistic" reasoning otherwise appearing in this article is interesting.[31]

If this constitutes the discharge of a "judicial function", then note that it is an exercise of such function with little or no opportunity for department heads, disbursing or certifying officers or claimants who are usually the most concerned, to appear and be heard; that even a hearing would be one before officers who feel that while decisions of the Supreme Court may be binding in the specific instance, they nevertheless establish no law; that decisions by the Court of Claims are not binding at all, and those of the circuit, district, or state courts are even less authoritative and will be followed only when deemed by the Comptroller General to be correct.[32]

Some of the other rationalizations and or machinations resorted to by the General Accounting Office or the Comptroller General to bolster the legality of actions taken by them which are inconsistent with court de-

[29] 28 Stat. 162-205.

[30] McGuire, Ill. Law Rev. XIX, p. 526.

[31] It runs—Major Premise: Only judges of inferior courts are bound by higher court pronouncements; Minor Premise: Accounting officers are not judges of inferior courts; Conclusion: Therefore accounting officers are not bound by rulings of superior courts.

[32] *McCabe* v. *United States* (1936), 84 C.Cls. 291, involved a claim by an army officer for transportation of his dependents to his home where he had been ordered to await retirement. In allowing the claim the court said: "There is no reason why the plaintiff should have been put to the expense of bringing suit to recover what is unquestionably due him except the arbitrary action of the General Accounting Office in refusing to follow the law as it has been announced by the court in previous decisions." (pp. 292, 293)

cisions on the subject, or for that matter with previous decisions by the Comptroller General himself, are weird indeed. For example, the Act of March 4, 1907, relating to claims of Civil War veterans, and the Act of March 2, 1923, relating to claims of railroads for transportation of government property [33] expressly state that the accounting officers shall follow the decisions of the courts in adjusting such claims. Therefore, they point to other statutes not having the same or similar provisions as being indicative of the expression of the will of Congress that it did not intend that such agencies were to be bound by court decisions. Your Committee is unaware of the existence of any authority in the Congress to create any agency or position not amenable to the law.[34]

Other trails left by the government's accounting officers produce some truly amazing results.[35] On page 5 of a reprint of an article published in the ABA Journal, February 1950, by Ernest L. Wilkinson, Esq., entitled "The United States Court of Claims: Where Uncle Sam is Always the Defendant," there appears the following in this connection:

"An almost incredible case arose in 1941 in *Belcher* v. *United States,* 94 Ct. Cl. 137. A postmaster ordered some coal from a local coal dealer to heat the local post office, after which both began their long vigil of waiting for the Government to pay. The coal dealer being in need of money both he and the postmaster went to the local bank and signed a note for an amount equivalent to the amount owed. The proceeds were turned over to the coal dealer, but he still owed the bank on the note. The Comptroller General in a letter refused to pay on the ground that, since the bank had paid the money to the coal dealer, the debt was extinguished!

"The education in finance which the coal man thus received from the Comptroller General proved too great a shock and he passed on to his reward. But his wife sued in the Court of Claims. And the Attorney General, by his representative, actually defended against the claim. The court, in rendering judgment for the full bill of $200, said through Chief Judge Jones:

> " 'We confess that we are . . . just a little surprised at the contents of the [Comptroller's] letter. It has neither pattern nor syllogism, but it certainly has point.
>
> " 'This method of settling government obligations is so novel that, if reduced to practice, it should be patentable. It would solve many national problems. The holder of a government obligation at one time or another is usually in need of money. He borrows money at the bank, and, ergo, the Government's obligation is settled.' "

As your committee reads a rather recent decision published by the Comptroller Gen-

[33] 34 Stat. 1356, 42 Stat. 1337.

[34] *McCulloch* v. *Maryland,* 4 Wheat. 316.

[35] It may be difficult to believe, but both the General Accounting Office and the Comptroller General have even attempted to criticize a United States Commissioner's handling of a criminal trial. In summarizing the issue in that case, the Court of Claims stated it as "whether the administrative branch of the Government . . . can require of him reasons satisfactory to the administrative branch, for acts on his part which involve the exercise of his discretion in the hearing of criminal cases brought before him." It held such action to be a "clear infringement and impairment of absolute control when exercising his sound judicial judgment." Moreno v. United States (1930) 70 Ct. Cls. 758, 762, 764.

eral, on February 11, 1952,[36] (apparently on his own motion, because it is addressed to no one) or less than forty days after a decision by the Supreme Court,[37] as to the meaning of a resolution by the Congress which he had theretofore interpreted differently, the Comptroller General announced in effect that he would continue applying his own concept of the legal meaning of the resolution, which concept was predicated on a broader base than that used by either the Supreme Court or the Court of Claims; to wit, that the employees involved were "not entitled as a matter of law to gratuity pay in addition to their pay for work done"; the Supreme Court decision to the contrary notwithstanding!

In conclusion, your committee believes careful and full examination and audit of all government expenditures is a proper and desirable function to be discharged by agencies which are independent of the executive branch; that such agencies should be given all requisite and necessary authority, facilities and means to effectively find and expose all fraud and incompetencies in the handling of public funds, both expenditures and collections. It does not believe that this can be accomplished by any office or agency which considers itself above the law and beyond the limitations which such law imposes in the discharge of these, or any other government function, as important as they may be. To those ends your committee hopes to have specific recommendations ready for the Section at its next meeting, designed to strengthen the loose governmental control over the administrative agencies covered by this interim report so that neither may ever be listed in the category to which Mr. Chief Justice Stone referred in 1942, or of which the Continental Congress was wary in 1775.

Respectfully submitted,

William D. McGraw,
Chairman.

Ben Paul Noble,
Vice Chairman.

[36] 31 Comp. Gen. 370.

[37] *United States* v. *Kelley* (1952), 342 U.S. 193.

## COMMITTEE ON EMERGENCY AGENCIES

Last year's report included a recommendation that the Committee on Emergency Agencies be continued on a stand-by basis only, at least for the present. That recommendation was made because of the substantial curtailment of federal emergency controls and because of the committee's opinion that since its inception in 1951 the procedures and practices employed by emergency agencies and other federal agencies exercising emergency powers had, on the whole, accorded substantial fairness to persons affected by the actions of those agencies.

During the past year, then, the committee—its views unchanged—has functioned on a stand-by basis only.

In doing so, however, it has endeavored to maintain surveillance over such proposed federal legislation as has dealt with emergency governmental powers; and in addition, it has interested itself in and followed

the progress of other committees of the Section whose work in whole or in part has borne some relationship to the subject of emergency agencies. In this category fell especially the matter of agency fees as they relate to emergency activities—a subject within the particular assignment of the Committee on Agency Fees—and the study of Renegotiation Board procedures undertaken by the Committee on Statutory Renegotiation.

For the same reasons expressed a year ago, it is recommended that the Committee on Emergency Agencies be continued on a stand-by basis.

Harry J. Breithaupt, Jr.
Chairman

## COMMITTEE ON FINALITY CLAUSES IN GOVERNMENT CONTRACTS

Your Committee on Finality Clauses in Government Contracts was able to report for the 1953 convention sessions that Senate Bill No. 24, introduced for the purpose of overcoming certain implications contained in the decision of *United States* v. *Wunderlich,* 342, U.S. 98, had passed the Senate but had at that time made no further progress. Prior to the assembling of the second session of the 83rd Congress, contact was made with Mr. Foley, Counsel for the House Judiciary Committee, Chairman Reed of the Committee and Congressman Graham of Pennsylvania, Chairman of a sub-committee which had under consideration the legislation previously passed by the Senate, as well as various bills of similar purpose, but in some cases of somewhat different approach, which had been introduced in the House of Representatives. It was then understood that both myself and David Reich, Esquire, Vice-chairman on the Committee would be notified if and when hearings were to be held upon the legislation in regard to the *Wunderlich* problem.

Due to hospitalization and surgery in late November, your Chairman was on the disabled list until about February 1, 1954 and was unable personally to follow up this matter in the early stages of the 1954 Congressional session when action became immediately necessary. The matter of presenting the case of the American Bar Association in the matter of the legislation in question was very adequately and successfully taken care of by Mr. Reich. Following the hearings held by the sub-committee the bill was reported and passed by the House of Representatives in a form which we believe will prove quite satisfactory to the members of the American Bar Association.

On May 4, 1954, following the forwarding of Senate Bill No. 24 to the President, the Section Chairman (John W. Cragun, Esquire) contributed an important assist to the Committee by addressing a letter to the President of the United States expressing the desire of the American Bar Association that the Bill be signed. Following this letter, President Eisenhower, on May 11, 1954, affixed his signature to the Bill.

I wish at this time to express my thanks to Mr. Cragun and Mr. Reich for their valuable assistance, also to Franklin M. Schultz, Esquire, formerly of Bloomington,

Indiana and now located in Washington, D.C., whose comments and studies proved valuable, and to other members of the Committee for their assistance. These members include Harry E. Ruddiman, Esquire, Paul Miller Rhodes, Esquire, Fred W. Shields, Esquire, and Allen H. Gardner, Esquire, all of Washington, D.C., Elmer M. Cunningham, Esquire of Richmond, Virginia, Albert M. Gross, Esquire of New York City, and Gardiner Johnson, Esquire of San Francisco, California.

The work originally assigned to this Committee has been completed. It is believed that any problems along this line which can now be anticipated may be referred to the Standing Committee on Public Contracts of the Section. It is therefore suggested that this Special Committee be abolished and its functions transferred to the Standing Committee.

/s/ Glen R. Law
Glen R. Law, Chairman

## COMMITTEE ON IMMIGRATION AND NATURALIZATION

The principal work of the Committee this year has been in connection with a bill to improve the reviewability of deportation orders. As the Committee knows, it has long been a defect of review by habeas corpus that the alien cannot secure review as to validity of the order until he is taken into custody. The Department of Justice has come to realize that this is not a sound situation and at the last summer meeting of the American Bar Association it was indicated that the Department of Justice would propose a bill to remedy the situation. The Section went on record at that time as being in favor of such a statute. Thereafter the Department drafted a statute and submitted it to the Section for consideration. It was studied by our Committee. Our study revealed that the bill had a number of serious defects and a meeting of our Committee was scheduled on January 15, 1954, which was to include a conference with representatives of the Department of Justice. Prior to the meeting the chairman circularized the Committee as to its views on the bill so that those attending the meeting would be in a position to adequately represent the views of the whole Committee. The meeting did take place and there was a very full discussion of the bill. The meeting was a successful one. The Department of Justice proceeded to reconsider its draft and accepted practically all of our important suggestions.

The Committee had two chief objections to the earlier version of the bill. First: it provided that the statutory method of review must be resorted to within 60 days of the final deportation order. Where the alien was subsequently taken into custody he could not by writ of habeas corpus test the validity of the deportation order if he had neglected to pursue the statutory method of review. There were exceptions for situations in which the statutory review would not have provided appropriate relief. The Committee was of the opinion that the statutory review should be in addition to the usual review by habeas corpus. It believed that there might be cases in which the alien did not understand his predica-

ment until he was actually taken into custody. The Department of Justice has accepted our position on this point. Under the present bill there is no statute of limitations on the statutory method of review and habeas corpus is open to the alien where he has not pursued the statutory method. If he has pursued the statutory method the determination there made is res judicata. With this we agree.

Our second objection to the earlier bill was that at the best the scope of the review was very unclear and at the worst it conceivably made review narrower than it might be under the present immigration act. The Committee believed that the APA scope of review provisions should be clearly and explicitly extended to the review of deportation orders. The position of the Committee on this point has also been accepted by the Department.

There are still certain defects in the present draft. It is expressly provided that a final order of exclusion can only be reviewed by habeas corpus proceedings. In explaining this provision the Department of Justice states that since an alien who has been excluded from this country is "ordinarily held in custody," habeas corpus is an adequate remedy. But aliens so excluded are not always held in custody. This is particularly true at land borders such as Canada and Mexico. At the present time attempts are being made to review exclusions under such circumstances by declaratory judgment. The provision in the new statute would seem to preclude a declaratory judgment and to provide no substitute. We should work for a clarification of this situation.

The Bar Association approved the proposed statute at its Winter Meeting and shortly thereafter the Department of Justice introduced the bill. To date the Department has not been very hopeful as to the prospects for the bill. The Judiciary Committee of the Senate appears to be indisposed to act upon any legislation amending the present immigration act at this session. It may be noted, however, that on April 14, 1954, three Republican Senators: Ives, Hendrickson, and Saltonstall introduced a bill (S. 3292), embodying a number of reforms of the present act including provisions for judicial review comparable to those suggested by us. One of these provisions is to the effect that "in any exclusion or deportation case, after the entry of a final order an alien may seek judicial review under §10 of the Administrative Procedure Act or under the Declaratory Judgment Act." This may indicate that there is some sentiment in the Senate for moderate reforms of the McCarran-Walter Act. Nevertheless, given the timetable of the present Congress it seems unlikely that anything will be done at the present sitting.

The present law (8 U. S. C. 1503) is also interpreted by the Departments of State and Justice to deny declaratory judgment actions to persons over sixteen years of age claiming American citizenship who have not previously been in the United States. (See *D'Argento v. Dulles*, 113 F. Supp. 933). Our Committee believes that such individuals are entitled to court review in declaratory judgment proceedings.

The 1952 Immigration Act has also been interpreted to eliminate the requirement of separation of functions pursuant to 5 U.

S. C. 1004. *U. S. ex rel Marcello v. Ahrens,* 113 F. Supp. 22 aff'd by the Fifth Circuit and now pending upon application for certiorari before the Supreme Court. A majority of the Committee believe that separation of functions is required under existing law and that if it is not, it should be. We believe that the special inquiry officer who conducts deportation and exclusion proceedings and who is not generally a lawyer, should be of higher caliber and should be selected from the legal profession.

Transcripts of records in immigration cases may not be purchased according to the General Counsel of the Immigration Service. We believe that this situation should be corrected. A majority of the Committee believe that the denial of a right to purchase a transcript violates 5 U. S. C. 1006 (d).

Exclusion hearings are by statute conducted separate and apart from the public. Deportation hearings are occasionally public. Generally physical facilities at the various immigration offices and ports of entry preclude public hearings. The Committee was equally divided as to whether immigration hearings should be open to the public.

Names of aliens are kept confidential in all published opinions regardless of the need for anonymity. This makes citations difficult and serves no useful purpose. A majority of the Committee favor the elimination of indiscriminate nondisclosure of names in published opinions. Effort should be made to publish the printed volumes of opinions with greater regularity. The last volume covers opinions through March 1950. Mimeographed opinions since that date, known as Interim Decisions, are not available for purchase or in law libraries. They are, however, available for inspection at immigration offices and are distributed to lawyers through the Association of Immigration and Nationality Lawyers. It is believed that Interim Decisions should be made promptly available to the public at large, to the same extent as decisions of other administrative agencies.

Louis L. Jaffe,
Chairman
Jack Wasserman,
Vice-Chairman.

## COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PROCEDURES

June 15, 1954

The Committee on Improvement of Administrative Procedures submits this general report for the year 1953-1954. It has submitted a separate report on hearing officers, in which certain policies are recommended to the Section in its further formulation of American Bar Association policy under the Administrative Procedure Act.

*President's Conference on Administrative Procedure*

This Committee has been instructed to transmit to the President's Conference on Administrative Procedure such suggestions as it may formulate, upon its own motion or at the instance of members of the Section, and such comments as it may have, relating to the work of the Conference. The Committee has been informed of the progress of the Conference and has studied the recommendations that have been made,

which have recently been distributed to members of the Section in printed form. The Committee has been in correspondence with two subcommittees of the Conference regarding problems before those subcommittees.

The first report of the Conference, containing the recommendations so far made, was adopted November 23-24, 1953. The third meeting of the Conference, which was to have resulted in further recommendations in June, 1954, has been postponed until fall.

*Office of Federal Administrative Procedure*

The first and probably the most important recommendation of the Conference so far, designated "A", advocates the establishment in the Department of Justice of an Office of Administrative Procedure. That Office would carry on studies, publish information, and suggest improvements, relating to the procedures of Federal agencies. An Office of Administrative Procedure has long been advocated in studies of administrative procedure which the Conference's report cites. Its establishment seems essential to provide the facilities for investigation and the continuity of study and effort which are required for continued procedural improvement. It is to be hoped that definitive action will result from the Conference's recommendation.

The principal reasons given by the President's Conference and by its committee which made the recommendation for proposing that the Office of Administrative Procedure be established in the Department of Justice are: (1) that in this way the "housekeeping" needs of the Office can be taken care of conveniently; (2) that, so located, the Office can be established immediately by executive action; (3) that it would be desirable to have the Office carry on its functions during an experimental period before legislation to provide permanently for it is formulated; and (4) that, among executive departments, the Department of Justice provides the most appropriate location.

This Committee recognizes the force of these considerations and agrees that the immediate establishment of an Office of Administrative Procedure is desirable. We feel, however, that such an Office should not be established until the President's Conference has formulated its recommendations concerning Section 11 of the Administrative Procedure Act and the administration of matters affecting hearing-officer personnel under that Section. These recommendations may well contemplate the performance of hearing-officer personnel functions by the Office of Administrative Procedure, as this Committee's report on hearing officer suggests may be desirable. If so, we believe the Office should not be located in the Department of Justice or in any other agency where its director would be subject to the political considerations that may be brought to bear, directly and properly, through a cabinet officer upon activities which are not effectively insulated from political pressures. We believe it is of the essence of a satisfactory hearing-officer personnel system that it be non-political in character. For this reason its administration should be in a non-political agency outside of a cabinet department.

Even if functions relating to hearing officers are not conferred upon the Office of Administrative Procedure, we believe the Office should be so located in the governmental structure as to secure a maximum of continuity in its work, accompanied by direct contacts between it and the agencies with which it should work. If the director is made responsible to a cabinet officer, not only may changes of administration produce changes in the directorship or in the policies of the Office or both, but the director is likely to feel compelled to deal with other agencies through his cabinet superior, at least in matters of importance. We think the professional and advisory functions of the Office should not be channeled in this manner. Therefore we believe it would be desirable to establish the Office in the first instance independent of any cabinet department. Placing it within the Executive Office of the President or the Bureau of the Budget, which are professional "staff" rather than "line" agencies, might be acceptable, if the establishment of so small an independent agency as the Office would be impracticable.

*Procedural Recommendations of the President's Conference*

The remaining recommendations of the President's Conference are directed to the United States courts (Recommendations "B") and to the agencies with respect to their procedures (Recommendations "C"). Many of these recommendations are important and, if followed, should contribute markedly to the improvement of both agency procedures and procedure upon judicial review. They are largely non-controversial but should have the serious study of all members of the bar.

This Committee welcomes especially the emphasis in Recommendations C5 and C6 upon not only prehearing conferences but other conferences during hearings, with a view to simplification, clarification, and disposition of the issues and shortening of issues. Through its subcommittee on prehearing conferences this Committee has long emphasized the importance of extending this type of procedure.

Recommendation C4, Definition of Issues before Hearing, reads as follows:

> "That the agencies require that in all proceedings the issues to be adjudicated be made initially as precise as possible, in order that hearing officers may proceed promptly to conduct the hearings on revelant and material matter only. Particularity should be required in complaints, answers, applications for rules or licenses, and petitions to intervene. In proceedings in which there is only one interested party besides the agency, the orders setting hearings should clearly specify the issues to be heard."

There could be no objection, of course, to making issues initially "as precise as possible". This Committee, however, doubts the feasibility of using pleadings for this purpose in complicated proceedings, such as those looking to the issuance of certificates of convenience and necessity. An application is filed; numerous intervenors signify their desire to participate; and frequently competing applications are brought together in a single proceeding. To attempt to define the issues by means of pleadings

would probably be time-consuming and self-defeating. In such a proceeding the best means of defining the issues probably is a prehearing conference as soon as possible after the papers have been filed. It is probable that efforts to define issues by means of pleadings will be most beneficial in the simpler type of proceeding, particularly those in which an individual who is dealing with an administrative agency needs a response from the agency as to the matters likely to arise at a hearing. In any proceeding would-be intervenors should, of course, be required to state the anticipated grounds of their contentions.

In the experience of some members of this Committee the maintenance of a topical index of the record during the course of a hearing for all to use is not likely to be feasible, since the topic headings are difficult to devise satisfactorily. Nevertheless, the practice advocated in Recommendation C11 may well be adopted experimentally. If it could be successful, real benefit would result.

*Codification of Regulations*

The enactment of Public Law 200 of the 83d Congress, approved August 5, 1953, is a development to be welcomed. The new law provides that the Administrative Committee of the Federal Register may require Federal agencies to prepare codifications of their regulations for publication in the Code of Federal Regulations. This measure will have value in rendering the Code inclusive and up-to-date. Further progress toward the complete publication of Federal regulations of "general applicability and Legal Effect" is needed;[1] but its realization awaits further study, perhaps by an Office of Administrative Procedure.

*Good-Faith Reliance Act*

Senate Bill 1752, 83d Congress, upon which this Committee reported last year, embodies the proposed Good-Faith Reliance Act and was endorsed by the American Bar Association last September. The bill has been before the Committee on the Judiciary since its introduction, awaiting reports from Federal agencies with regard to its effects upon them. These reports have been slow in coming, but enough are understood to have been submitted to warrant the belief that if the bill is introduced in the next Congress it will receive active consideration.

*Subcommittee on Informal Adjudication*

The attention of lawyers tends to be centered almost exclusively upon procedural problems incident to the formal, record-type hearing procedures of administrative agencies. Quantitatively of much greater significance are the processes of informal adjustment and of administrative action without hearings, which are carried on under numerous statutes, such as licensing laws and social security measures. The social and economic importance of these proceedings, frequently involving small businesses or individual applicants, is also high. It seems appropriate, therefore, for this Committee to direct increased attention to them. Accordingly a subcommittee on in-

[1] See Newman, Government and Ignorance, 63 Harv. L. Rev. 929 (1950).

formal adjudication has been established to consider the problems in this area and to call attention to needed improvements. The work of the subcommittee is only commencing.

*Developments in Particular Areas*

With whatever differences of view as to details, lawyers interested in administrative procedure will welcome the action of the Federal Trade Commission this spring in providing for the substitution of narrative summaries and reasoned opinions for formal findings in its cease-and-desist proceedings; in directing that such written conclusions be stated in cases resulting favorably to respondents as well as in those favorable to the Commission; and in extending the use of consent orders. Such agency-by-agency reforms are vitally needed alongside of general measures; and this one was needed especially.

With the apparent concurrence of all interests, efforts to simplify the food-standard proceedings of the Food and Drug Administration, bore fruit on April 15, 1954, in Public Law 335. The volume of the records and the delays incident to these proceedings have long constituted a major problem. Although this Committee is not in a position to endorse the particular bill just enacted, it does wish to call attention to the desirability of the kind of professional cooperation that entered into this successful effort at procedural simplification.

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## REPORT IN RE HEARING OFFICERS

**of the Committee on Improvement of Administrative Procedures**

May 10, 1954

The Committee on Improvement of Administrative Procedures recommends that action by the Section of Administrative Law with respect to federal hearing examiners, pursuant to the resolution adopted by the House of Delegates March 9, 1954, be based upon the following considerations,

in addition to the conclusions stated in the resolution:

1. That the independence which hearing officers should have, analogous in many respects to the independence of the trial judge, involves primarily the fact-determining function and is not inconsistent with agency control of policy and of efficiency in hearing procedure;
2. That a career service for hearing officers is desirable;
3. That the responsibility for creating and maintaining proper standards for the corps of hearing officers as a whole should rest within the executive branch of the government; and
4. That hearing officers should serve continuously for substantial periods of time in the agencies they serve.

*Independence of Hearing Officers*

The analogy of hearing officers to trial judges stems from the statement in the Final Report of the Attorney General's Committee on Administrative Procedure, at page 51, that, "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy ought, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." The Report also states on the same page that "the Committee contemplates that" the decision of the hearing officer "will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court."

The foregoing statements are made in the context of the over-all conclusion that hearing officers should not become a separate corps outside of the agencies, appointed by the President, by and with the advice and consent of the Senate. The Committee concluded, rather, that "specialization is one of the fundamentals of the administrative process" and that it requires the work of a hearing commissioner to be within a particular agency. "The hearing commissioner is in a very real sense acting for the head of the agency. He is hearing cases because the heads cannot as a practical matter themselves sit. He plays an essential part in the process of hearing and deciding. Those responsible for the work of the agency have a vital interest that this process shall be effectively and fairly performed."

The Report goes on to recommend that hearing "commissioners" be nominated by employing agencies and appointed, if found to be qualified, by an Office of Administrative Procedure, with salary and term of office to be fixed by statute. Safeguards within the agencies, to secure the requisite independence of hearing officers, were recommended; and powers in the conduct of hearings, such as Section 7 of the Administrative Procedure Act now bestows upon hearing officers, were advocated.

The minority report of the Attorney General's Committee did not differ with these conclusions as to hearing officer relationships, except in matters of detail not here relevant. It advocated that there be segre-

gation in different agencies of the functions of hearing and deciding on the one hand and of initiating proceedings and prosecuting them on the other hand; but as between the heads of a deciding agency and the hearing officers, the minority report recommended the same relationships as the report of the Committee.

Hearing officers should be enabled to find facts and exercise their judgment without fear or favor; but their work remains an integral part of the responsibility of agency heads who are charged with administering the governing statutes. Means should be provided to secure efficiency and respect for agency policy on the part of hearing officers. It is unlikely that this result can be obtained if hearing officers, independent of all supervision except through removal proceedings in a court or in some other agency having only limited concern with administration, are placed in charge of vital hearing procedures. "Fully independent judgment in hearing and initially deciding cases" and "independent appointment, tenure, and compensation," which the American Bar Association advocates in "cases of adjudication," do not require that a new, unsupervised judiciary be inserted into the process of administrative adjudication. Such would be the effect of appointment of hearing officers by the President to a single grade for life, unaccompanied by power of supervision over them.

Existing proposals, following the pattern of Section 11 of the Administrative Procedure Act, contemplate uniform measures to be applied to all hearing officer positions, whether the functions to be performed relate to adjudication or to rule-making, under Sections 4, 5, 7, and 8 of the Act. The resolution of the American Bar Association, on the other hand, relates only to adjudication. We believe it would not be feasible to provide differently for hearing officers for the two classes of functions. This consideration suggests that whatever scheme is adopted be kept within the actual requirements of fair adjudication, avoiding so far as possible any imposition which would hamper rule-making.

A sound solution to the hearing officer problem requires, then, that independence of judgment on the part of hearing officers be accompanied by responsibility for the efficient conduct of proceedings and for good-faith application of agency policies to the facts as found. "Independent appointment, tenure and compensation of federal hearing officers", which we support, is not inconsistent with the means of securing such responsibility; but these means, equally with independence, must be planned with forethought.

*Desirability of a Career Service*

In the federal judicial system effective conduct of the trial courts is stimulated not only by appellate review but also by the activities of the Judicial Conference and of the Chief Justice and senior circuit judges, by the availability of data supplied by the Administrative Office of the United States courts, and, possibly, by the opportunities—exceptional though they are—of advancement to higher-court vacancies. The considerations set forth above point to the desirability of somewhat more effective supervision for hearing officers than the judiciary receives, to correlate their work with

that of the agencies and to afford incentives to the type of personnel likely to enter these positions. Because appointment, tenure, and compensation are to be independent of agency control, the requisite supervision must come through an authority which is cognizant of agency needs and of appropriate personnel methods. Review of hearing officer decisions by the agencies, accompanied by the bare possibility of removal for cause, will scarcely suffice.

The necessity of keeping constantly geared to the policies of an agency and of acting as the alter-ego of agency heads imposes conditions which differentiate hearing officer positions from those of district judges and seem likely to continue to result in attracting a different type of personnel to them. Important though these posts are, it is the agency headships, rather than hearing officer positions, which will continue to rank with district judgeships in interesting persons who have had distinguished legal careers and have developed rich professional learning and mature ability to deal with a variety of affairs. Hearing officer positions, in all probability, will continue to attract lawyers who have not reached equivalent eminence, preferably at an early stage of their professional careers. It follows that genuine opportunities for advancement within the hearing officer system should be provided, as a means of recognizing merit and furnishing an incentive to superior performance. The establishment of a career service for hearing officers, with provision for different salary levels, appears to offer the best over-all solution.

Whatever may be the method of initially appointing hearing officers, determinations with regard to their promotion and retention should be in the hands of a central authority qualified to pass on such matters, outside of the agencies which the hearing officers serve. To avoid dependence by hearing officers upon the agencies they serve for advancement, the central authority should be charged with studying the quality of the decisions of hearing officers and the efficiency of their performance, and with taking steps, including the conduct of removal proceedings where necessary, to secure fair, efficient conduct of hearings by hearing officers.

*Responsibility in the Executive Branch*

It seems evident that the responsibilities just stated which would fall to the office that supervises the hearing officer personnel system, should be within the executive branch of the government. Although that branch is loosely organized, it is characterized throughout by administrative responsibility. An office within that branch is more likely to remain cognizant of the specific considerations surrounding the work of hearing officers than would the individual hearing officers, if given life tenure and no opportunities for advancement, or federal judges in occasional removal proceedings, if these should become the means of maintaining good performance. This Committee urges, therefore, that an office in the executive branch be established to supervise hearing officer personnel and that it be charged with determining salary increases and promotions for hearing officers on the basis of information which it continuously gathers. This office should aid the authority which appoints hearing officers in the first in-

stance, or itself perform the appointing or nominating function.

Obviously an independent office of administrative procedure, if one should be established, would be a suitable authority to administer the hearing officer personnel system. It would both be thoroughly cognizant of the considerations to be taken into account and maintain data concerning agency performance which could be reflected in its determinations concerning hearing officers. A personnel office for government legal positions, if one should be established outside of the Civil Service Commission as a result of studies now being made by the Commission on Organization of the Executive Branch, might also be a suitable authority to exercise these functions through a hearing officer division. This Committee believes the time has not yet arrived for making a choice among these alternatives and other possible repositories of these functions. At least, the report of the President's Conference on Administrative Procedure with respect to an Office of Administrative Procedure should be awaited.

*Employment of Hearing Officers within Agencies*

Assuming that the hearing officer personnel system is to be administered by a central office, a choice must be made between having the hearing officers employed by that office or by the agencies they serve. This choice probably can be made without reference to providing for the full utilization of the time of hearing officers, since typically the several agencies have a sufficient case load to keep full-time hearing personnel busy. The choice turns, rather, upon considerations of need for hearing-officer independence on the one hand and correlation with other aspects of the work of the agencies on the other hand. This Committee believes that the independence of hearing officers is sufficiently safeguarded by the centralized personnel administration which we recommend. Proper attention to agency policy by hearing officers is also secured by such an administration, which will be cognizant of this factor. Adequate specialization and expertness on the part of hearing officers, however, will not be secured by this means. Therefore we believe that hearing officers should be employed by the agencies they serve or be assigned to them for substantial periods of time, in order to secure specialization in particular agency functions on their part. We do not believe such specialization is required before appointment. Rather, hearing officers should possess professional competence to conduct hearings, personal capacity to comprehend issues under legislative enactments, and ability to conduct hearings in a dignified, efficient manner. These qualities may be found in lawyers with a minimum of, say, five years' substantial professional experience, or possibly, as to some positions, equivalent professional experience such as that of social workers in the social security field. A hearing officer who possesses these qualifications will, however, become far more effective in carrying on his duties within an agency if he becomes expert in the problems of that agency. The advantage of this expertness should not be lost in whatever system for hearing officers is now established.

To take care of fluctuations in the work load of particular agencies, to secure a change in the specialization of hearing officers who may need the stimulus of new problems, and to provide opportunities for promotion if vacancies in the higher grades of a particular agency do not occur, a liberal system of transfers from one agency to another should be provided. In the alternative, employment of hearing officers by the central personnel agency and their assignment for considerable periods to particular administrative agencies might be attempted, if budgetary correlation can be achieved under such a system.

*Conclusions as to Method of Selection*

Doubtless the head of an office of administrative procedure or legal personnel agency would be considered the "head of a department" within the meaning of Article 2, Section 2 of the Constitution, to whom the appointment of hearing officers might be entrusted. The choice as to manner of appointment seems to lie between such a device and appointment by the President. If the latter alternative were adopted, the President should be aided by a process of screening applicants, administered by a suitable authority such as an office of administrative procedure of a legal personnel office, which would supply him with lists of qualified candidates for appointment. If the President cannot be restricted by statute to making appointments from such lists, because Article 2, Section 2 may require that he retain full discretion if he becomes the appointing authority, the screening process might nevertheless be established by executive order which the governing statute might authorize. Such a screening process could make hearing officer positions genuinely available to applicants throughout the country and render the ultimate selection one based strictly on merit considerations. If the power of appointment were lodged in the head of an office instead of in the President, the same methods of screening applicants should be employed. This Committee deems such methods to be essential. Whether or not the process of choosing federal judges works satisfactorily for judicial posts, we do not believe it would be successful for hearing officer positions, which are far more numerous and must be filled with personnel that, at least in the first instance, will not have risen to the eminence of candidates for federal judgeships.

We refrain from discussing at this time the methods of screening which might be employed. They have been well discussed in the report of Robert M. Benjamin in his Administrative Adjudication in the State of New York (1942), pp. 268-292. Experience with such methods has been had by the Division of Administrative Procedure of the State of California. In addition, the experience of the Board of Legal Examiners of the Federal Government, which administered a legal personnel system during World War II, is also available; and it is likely that the further studies of the Commission on Organization of the Executive Branch will produce additional suggestions.

This Committee concludes that the American Bar Association (1) should oppose the appointment of hearing officers by the President, by and with the advice and consent of the Senate, (2) should favor the maintenance of a career service for hearing officers, and (3) should favor the appoint-

ment of hearing officers either (a) by an independent Office of Federal Administrative Procedure or a legal personnel agency administering a merit system or (b) by the President from among candidates who have been screened on merit-system principles by an agency which also administers a merit system applicable to promotions and removals. The choice between alternatives (a) and (b) should await reports of the President's Conference on Administrative Procedure and the Commission on Organization of the Executive Branch of the Government which are expected to make recommendations concerning possible establishment of the agencies mentioned.

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Monroe Oppenheimer
John C. Pirie
George R. Richter, Jr.
E. Blythe Stason
Robert L. Stern
Lehan K. Tunks
James R. Withrow, Jr.

Dean Stason, because of his position on the Task Force of the Hoover Commission having responsibility for making recommendations concerning hearing examiners, does not wish at this time to take a position in opposition to the appointment of hearing officers by the President, with the advice and consent of the Senate.

## COMMITTEE ON JUDICIAL REVIEW

The Committee on Judicial Review was established as a new committee by the Council at its Atlanta meeting on March 6-7, 1954.

The purpose of this committee is to study all federal and state legislative and administrative proposals with respect to judicial review of administrative activities; to follow court and administrative decisions, and to report and recommend to the national committee where the subject matter involves federal judicial review.

Although the full personnel of the committee has not yet been appointed its scope and method of operation have been pretty well worked out.

It is anticipated that the work of the committee will embrace these activities:

(1) The Committee will follow and analyze all federal and state cases involving the availability or scope of judicial review

of orders of administrative agencies. These cases will be analyzed to determine whether the courts are granting a broad or narrow judicial review of these orders.

(2) The Committee hopes to consult with other committees of the Section on problems of judicial review encountered by those committees.

(3) Based upon its experience in reporting and analyzing current cases and of consulting with the other committees on special problems relating to judicial review, the Committee expects to determine and recommend whether additional legislation is required either in the federal or the state fields in order to assure an adequate judicial review of administrative orders.

The work of the committee can reach its maximum effectiveness only if it is able to follow all of the developments in the field of judicial review. The committee has been organized on such a basis that it will receive notice of all reported cases. This will be done by a systematic review of all of the West regional and federal reporters and the Pike and Fischer Administrative Law reports. There will undoubtedly be numerous decisions which are not reported and many efforts to obtain an adequate judicial review which are unsuccessful. The committee believes that its work can be made much more effective if the members of the Section will keep it advised of the problems which they encounter in this field.

John D. Conner
Chairman

Henry M. Shine,
Vice Chairman

## COMMITTEE ON LABOR

### Introduction

During the present session of the 83rd Congress, the Labor Committee of the House of Representatives considered in executive session various amendments to the Taft-Hartley Act. One such amendment, which the Committee approved, would have had the effect of transferring jurisdiction over unfair labor practice cases from the National Labor Relations Board to the Federal district courts. The House Committee did not report out any bill, because in May, 1954, the Senate recommitted its bill to amend the Taft-Hartley Act, and it was then decided by the Congressional leaders not to press for any action on the Taft-Hartley Act this year.

Nevertheless the House proposal to transfer unfair labor practice cases to the Federal courts had such strong support that the undersigned Committee believes the following report to be in order.

### Analysis of Proposal

The more salient features of the proposal follow:

1. Under the proposed amendment the office of General Counsel of the Board, established by Section 3(d) of the Act, would be abolished. The General Counsel is presently the officer charged with prosecuting unfair labor practice cases before the Board.

2. Likewise the position of Trial Examiner, established by Section 4(a) of the Act, would be abolished. The Trial Examiner,

of course, is the officer who at present presides at unfair labor practice hearings.

3. Section 10 of the Act, relating to the prevention of unfair labor practices would be completely rewritten so as to confer upon the Federal district courts jurisdiction to prevent unfair labor practices. A complaining party would have a choice either (a) of filing an unfair labor practice charge with the U.S. Attorney and requesting the latter to prosecute an unfair labor practice complaint in the Federal district court or (b) of prosecuting such a complaint himself. Furthermore, if the U.S. Attorney failed to take action because he regarded the charge as frivolous or without basis, the complaining party could prosecute a complaint in the Federal district court on his own initiative. The U.S. Attorney would be directed to give priority treatment to certain types of secondary boycott cases. Moreover, all unfair labor practice cases in the Federal courts would be entitled to advancement on the docket.

The cases in the Federal courts would be tried without a jury and in general under the Federal Rules of Civil Procedure. Issues of fact could be submitted to a master. Pending final disposition, the courts would be empowered to grant temporary injunctions, but only on the basis of a public hearing at which all parties were given full rights of cross-examination. After trial and as part of its final order, a court could enjoin the unfair labor practice found and provide a remedy by way of back pay or reinstatement.

The non-Communist affidavit and other filing requirements would have to be satisfied by either the employer or the union, depending upon which was the complaining or charging party, as a prerequisite to the filing of a complaint in the Federal courts or the filing of a charge with the U.S. Attorney.

### Committee Views

The Committee is unanimously opposed to the foregoing proposal for the following reasons:

1. The National Labor Relations Board is a specialized agency equipped to handle the peculiar problems of labor relations. The Federal courts, on the other hand, have neither the special knowledge nor the facilities for dealing with unfair labor practice cases. Just as problems involving workmen's compensation and fair trade practices, for example, can best be handled initially by administrative agencies, so jurisdiction over unfair labor practices should be entertained by the appropriate administrative agency, the National Labor Relations Board. The Board frequently attacks unfair labor practice problems from a practical and not legalistic viewpoint, which is all to the good. The Federal courts, however, are not set up to handle problems in such a way.

2. If jurisdiction over unfair labor practice cases is kept in the Board, the decisions will be more uniform than if jurisdiction is spread among the Federal courts. Courts frequently reach diverse conclusions as to a particular problem, so that on the same set of facts different courts might reach different conclusions as to whether an unfair labor practice had in fact been committed. It would then take a substantial length of time before the United States

Court of Appeals and the United States Supreme Court reconciled these different conclusions and established the correct rules. Such delays would be avoided if the Board alone retained jurisdiction over unfair labor practice cases in the first instance, subject only to review by the United States Courts of Appeals and the United States Supreme Court.

3. The Federal courts are overcrowded and to increase their burden would impede rather than facilitate the administration of justice. To confer jurisdiction upon them over unfair labor practice cases would take them away from their regular duties and might tend to lower the character of the Federal courts somewhat, as the flood of Prohibition Amendment cases did some years back. Even though the House proposal provides for priority on the court calendar of unfair labor practice cases, there would probably be lengthy delay as a general rule even before the case reached the trial stage. Such delay, of course, would impede the efficient administration of the Act.

4. The objection to the present system of letting the Board have jurisdiction over unfair labor practice cases is based primarily upon the alleged bias of past Board members and regional personnel. This defect should be remedied at the source and it is the Committee's view that this has already taken place in part. In the past year particularly, the handling of unfair labor practice cases by the Board has been quite good. It is doubtful that any other method of handling such cases would have been better, considering the various stages of development through which labor management relations have been progressing. There is every reason to believe, in view of its recent performance, that the handling of these cases by the Board will continue to improve.

Respectfully submitted,

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June 1954

## COMMITTEE ON NATURAL RESOURCES AND INTERIOR AFFAIRS

### I Scope of Report

The Section of Administrative Law, American Bar Association, is concerned primarily with the procedural and operational aspects of administrative law rather than the substantive aspects of statutes under which administrative agencies operate, or the substantive output of administrative adjudication and rule making (page 12, Proposed Handbook for Committee Chairmen). The role played by the Committee on Natural Resources and Interior Affairs in the activities of the section is described as follows:

> "The purpose of this committee is to study procedural aspects of the laws, regulations, court and administrative decisions, and practices related to Na-

tural Resources and Interior Affairs and to report and recommend to the National Committee." (See Report of Committee on Organization and By-laws, February 19, 1954.)

It is noted that among the committees of the Section covering particular Federal activities is a committee on "Gas and Electric Power", assigned to cover the administrative law pertaining to those resources. Accordingly, gas and electric matters are excluded from the scope of this report.

The present report is designed to cover recent activities in the field of administrative law affecting natural resources and Interior affairs. The material reported falls under three main headings: Judiciary, Legislation, and Administration.

## II Judiciary

Recent administrative law decisions within the scope of this Committee's concern, may be divided under four subheadings: Rule Making, Adjudication, Production of Evidence, and Judicial Review of Agency Action.

### 1. *Rule Making*

A change of Interior Department regulations governing hours of salmon fishing in Alaskan waters was held inoperative as law until published by the Department in the Federal Register pursuant to Section 4 and 2(c) of the Administrative Procedure Act (5 U.S.C.A. § 1001(c), 1003). *Hotch* v. *United States*, 208 F. 2d 244 (9th Cir. 1953) (rehearing den. 1954). The amendment in question closed certain hours for commercial salmon fishing, providing criminal liability for violation of its terms. The prohibited fishing on the part of the defendant occurred on May 22, 1952, three days after May 19, 1952, when the Department had announced the amendment but failed to publish it in the Federal Register.

The opinion is interesting in two aspects. First, it presents an authority for subjecting the Department of the Interior to the Rule Making provisions of the Administrative Procedure Act, Section 4, at least in functions analogous to those of Alaskan fishing regulations. The Department itself has recognized their subservience to Section 4 of the Administrative Procedure Act in the formulation of regulations under the Migratory Bird Treaty Act of July 3, 1918. (M-34864 to the Director, Fish and Wildlife Service, February 18, 1947. See 1953 Report on this Committee). That decision was based on the general law that wild animals and birds, *ferae naturae,* belong to the State where located, and hence, are not "public property" as excepted from Section 4 of the Act. The Department of the Interior, however, has construed "public property" to include the public domain, thus excluding a large portion of their activities from the rule making requirements of Section 4. The interesting point of the *Hotch* case is that Alaskan fish, under the *ferae naturae* rule, appear to be Government property, yet held subject to the Procedure Act's rule making safeguards. The Court's opinion, however, contains no analysis of this point.[1]

[1] A point weakening the precedent value of the decision is that while the Court cited Section 4 of the Administrative Procedure Act. is apparently intended to refer to Section 3 requiring publication of agency action in the Federal Register. For problems the Department has encountered in the publication of Alaskan Fishing Regulations see letter dated June 22, 1954, by Solicitor Clarence A. Davis, attached to this report.

2. *Adjudication*

An order by the Secretary of the Interior withdrawing public lands for designation as an Indian reservation in Alaska was held invalid on the ground, among others, that no notice was given to interested parties with an opportunity to be heard. *United States v. Libbey, McNeil, and Libbey,* 107 F. Supp. 697 (D. C. Alaska 1952). The Court analyzed the establishment of a reservation as partaking more in the nature of an adjudication resulting in an order, rather than the formulation of a rule. As none of the statutes relied upon by the Secretary for the creation of the reservation in question required that a hearing be held, the Court was forced to conclude that Section 5 of the Administrative Procedure Act (5 U.S.C.A. § 1004) of itself did not require the giving of notice to interested parties before the Secretary acted. The Court went on to find, however, that the Constitution requires that an agency observe the essentials of due process in proceedings beyond the scope of Administrative Procedure Act. Section 3 of the Act (5 U.S. C.A. 1002) requires the publication of certain specified information in the Federal Register. The Court looked to the legislative history of the Administrative Procedure Act (U. S. Code Congressional Service, 1946, page 1205) and reached a conclusion that in matters affecting the rights of the public, the procedure of the Secretary in disregarding the provisions giving notice and hearing was not in accord with the spirit and purpose of the Act. The Court concluded that the Administrative Procedure Act was applicable and that the reservation was not validly created.

The decision portrays a need felt by the Court for the Department's adherence to the procedural safeguards elucidated in the Administrative Procedure Act even though it appeared that the Act did not expressly require such adherence. The case is interesting, for under many acts administered by the Department there is no statutory requirement for a hearing.

3. *Ancillary Matters*

The power of the Federal Petroleum Board to issue a subpoena *duces tecum* pursuant to its investigation into alleged violations of the Connally "hot oil" act was considered in *Kilgore National Bank* v. *Federal Petroleum Board,* 209 F. 2d 557 (5th Cir. 1954). The Board felt the documents requested to be relevant and material to the matters under consideration and investigation. In the Act creating the Federal Petroleum Board (15 U.S.C.A. § 715 et seq.), Congress adopted by express reference the provisions of section 78(u) of the Securities Exchange Act empowering the Board to subpoena witnesses and to require the production of any books, papers, correspondence, memoranda, or other records, which "the Board deems relevant or material to the inquiry". The Court held that the Board's stated finding of relevancy bears at least a *prima facie* stamp of correctness and is not required to be rejected by the Court from which the Board must seek enforcement of its subpoena. To overcome the presumption of correctness in favor of the Board, the challenging party must make a satisfactory showing that the Board has erred, or that the subpoena sought is unlawful, capricious or arbitrary. Appellants in the case also contended that

the Board was unable to issue or enforce its subpoena because of noncompliance with the publication provisions of the Administrative Procedure Act, Section 3 (5 U.S. C.A. § 1002). Without analyzing the applicability of that section, the Court held that the Board's authority in the present case was derived from an expressed statute.

4. *Judicial Review of Agency Action*

In *Sellas* v. *Kirk,* 101 F. Supp. 237 (D. C. Nevada, 1951), affirmed 200 F. 2d 217 (8th Cir. 1953), the plaintiff sought judicial review of determinations made by the Secretary of the Interior under the provisions of the Taylor Grazing Act (43 U.S.C.A. § 315a). The plaintiff had sought grazing privileges for a certain number of his livestock, but had been granted the privilege only for a lesser number of animals. Judicial review of the Secretary's action was denied because the adoption and application of the rules governing the granting of such permits "was agency action committed by law to agency discretion", and hence excepted from Section 10 of the Administrative Procedure Act (5 U.S.C.A. § 1009).

However, judicial review of an order of the Secretary of the Interior approving the will of an Indian, and ordering the distribution of the estate thereunder, was granted pursuant to Section 10 of the Administrative Procedure Act and held not within the exception of "agency action committed by law to agency discretion". *Homovich* v. *Chapman,* 191 F. 2d 761 (C. A. Dist. Col. 1951). The Court, in an opinion by Circuit Judge Prettyman, analyzed the basic act enabling Indians to dispose of property by will (Act of June 25, 1910; 25 U.S.C.A. § 373), concluding first, that the Act made no provision precluding judicial review, and second, that, although the acts of the Secretary in providing regulations for the execution and approval of Indian wills required the exercise of discretion and judgment on his part, such an exercise of discretion was not the type excluded from judicial review by the second prohibitory clause of Section 10 of the Administrative Procedure Act. The Secretary had argued that there can be no review where agency action "involves" discretion or judgment. In answer the Court stated:

> "Obviously the statute does not mean that; almost every agency action 'involves' an element of discretion or judgment. Whether the Court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the Court may review the action for purposes of determining its validity." (p. 764)

Hence, the Secretary's determinations with respect to Indian wills are subject to judicial review under the Administrative Procedure Act, although the Court, upon review, might not disturb his decision if within the scope of the authority conferred upon him.

An interesting case concerning the scope of judicial review is found in *Osage Nation of Indians* v. *United States,* 119 Ct. Cl. 592, 97 F. Supp. 381 (1951) cert. den., 342 U.S. 896, 96 L. ed. 672. The issue before the Court was the scope of judicial review over decisions of the Indian Claims Commission under Section 20 of the Indian Claims Commission Act of August 13, 1946. Section 20(b) of the Act, providing for appeal from the determinations by the

Commission to the Court of Claims, gave the Court the power to determine "whether the findings of fact of the Commission are supported by substantial evidence." This language used in Section 20(b) is similar to the language delineating scope of Judicial Review in Section 10(e) of the Administrative Procedure Act, enacted shortly before the Indian Claims Commission Act. The Court considered the two acts as parallel.

In reviewing the decisions defining "unsupported by substantial evidence," the Court of Claims noted that the phrase had been judicially construed as meaning "anything from 'warrant in the record', 'rational basis', 'not arbitrary', 'some evidence', 'reasonable', to what is commonly understood as being the preponderance of the evidence", often depending upon the expertness of the particular agency. The Court, however, followed *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 95 L. ed. 456 (1951) which concluded that the judicial review provisions of the Administrative Procedure Act require that "substantial evidence be determined in the light of the whole record", and further that the wording of the Act in the light of its legislative history placed upon the Court the responsibility for the *reasonableness* and *fairness* of Administrative tribunals' decisions. The Supreme Court cautioned, however, that Courts must give great respect to specialized or technical findings of an expert agency, and even in non-expert matters, should not displace the agency decision because the Court might justifiably have arrived at a different result if the matter had been before it *de novo.* The Court of Claims, before proceeding to test the substantiality of the findings of fact by the Indian Claims Commission, first pointed out that the issues involved concerned matters in which the Court of Claims was as expert as the Commission and noted further that the evidence before the Commission was largely documentary and not conflicting, giving the Court an equal opportunity of evaluation. The Chief Judge concurred in the opinion, but felt that the majority had skirted close to a *de novo* review of the facts. Whitaker, J., dissented, on the ground that there was substantial evidence to support the findings of the Commission.

Should the agency be expert, the scope of review would be clearly more limited on issues of fact. In *United States v. Federal Power Commission,* 345 U. S. 153, 97 L. ed. 918 (1953) in answer to the Secretary of the Interior's contention that the Federal Power Commission improperly exercised its power in granting a license to a private power company to construct a power station in the Roanoke River Basin, the Court held:

> ". . . we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason." (p. 171)

### III Legislation

As particular legislation of interest to the study of administrative law procedures may contain provisions dealing with a num-

oer of procedural issues, the material hereunder is divided into subject matter headings concerning the resource or interior affair question. Only bills and legislation of the 83rd Congress are considered.

1. *Atomic Energy*

*S.* 3323 and *H. R.* 8862 introduced by Senator Hickenlooper on April 14, 1954, and Representative Cole on April 15, 1954, respectively, are identical bills; both were referred to the Joint Committee on Atomic Energy, where hearings are being held. The measures set forth extensive amendments to the Atomic Energy Act of 1946.

Section 181 (Chapter 17) of the bill provides that the Administrative Procedure Act shall apply to all "agency acts" as defined by the Administrative Procedure Act, except in those matters requiring secrecy. Even in the latter case the Commission must provide by regulation for identical procedures exclusive of making them public. Hence, in general, except as noted below, the new bill does not change the procedural provisions of the 1946 Atomic Energy Act, which made the Administrative Procedure Act applicable to "agency action" by the Atomic Energy Commission. But the procedural safeguards will take on new significance as the Atomic Energy Commission assumes licensing functions with respect to civilian industrial uses of atomic energy similar to that of the Federal Power Commission for power licensees.

Section 187 gives the Commission in cases of "extreme importance to the national defense and common security or to the public health and safety" the power to:

> ". . . recapture any special material held by the licensee, before any hearing provided under the Administrative Procedure Act."

Section 188 establishes within the Commission a review board of three members appointed by the President, with the advice and consent of the Senate, to review granting or denial of licenses, construction permits, the issuance or modification of rules and regulations, and determinations of just compensation under the Act. Whenever the Review Board makes a final determination on any petition, the Commission must enter an order embodying the determination, which becomes the final order of the Commission.

Apparently in view of the new review board within the Commission, Section 189 proposes judicial review of any Commission order by a United States Court of Appeals pursuant to the Act of December 29, 1950 (c. 1189, 64 Stat. 1129), in contrast to the original Act's reference for review to Section 10 of the Administration Procedure Act. The Commission itself may appeal if the Review Board changes a pre-existing Commission order. But Section 190 precludes any court action, whether otherwise maintainable or not, if the Commission with the concurrence of the National Security Council finds that such action would necessarily involve the disclosure of restricted data. The original 1946 Act's special provision for judicial review in the Court of Appeals for the District of Columbia of the Commission's patent awards or royalty determinations has been eliminated by the bill.

2. *Submerged Lands*

*H. R.* 4198 *became P. L.* 31, 83*rd Congress* upon signature by the President on May 22, 1953. It vested all right, title, and interest to lands beneath navigable waters within the historic boundaries of the states in the respective states. The measure also provided that in addition to, but distinct from, ownership and title, the states shall have the right and power to manage, administer, lease, develop and use such lands and natural resources.

The Act does not affect the rights of the United States to the resources of the Continental Shelf outside state boundaries, which lands are declared to be appurtenant to the United States and subject to its jurisdiction and control.

*H. R.* 5134 became *P. L.* 212, 83*rd Congress,* upon signature by the President on August 7, 1953, and provided for the jurisdiction of the United States over the submerged lands of the outer Continental Shelf, authorizing the Secretary of the Interior to lease such lands for certain purposes. The "Outer Continental Shelf" applied to all submerged lands beyond the three-mile limit quitclaimed to the states as defined in Section 2 of the submerged land grant, *supra.*

Section 4 provides for laws applicable to the outer Continental Shelf. First, the Constitution and United States laws apply to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state. Similar to other areas of exclusive Federal jurisdiction, the Act declares that the civil and criminal laws of each adjacent state are the laws of the United States, enforceable by the officers and courts of the United States to the extent that they are applicable and not inconsistent with the Act or other Federal laws or regulations of the Secretary. To enforce the applicable law, United States District Courts are given original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf.

Section 5 of the Act entrusts to the Secretary of the Interior the administration of leasing of the outer Continental Shelf, authorizing him to prescribe any necessary rules and regulations. In the formulation of rules and regulations, however, the Act makes no provision subjecting the Secretary to the procedural requirements for rule making found in Section 4 of the Administrative Procedure Act (5 U.S.C.A. § 1003). Since the Outer Continental Shelf in Section 2(a) of the Act is defined as the "subsoil and seabed appertaining to the United States and subject to its jurisdiction and control," the Shelf area would probably be excluded from the Administrative Procedure Act as "public property". In view of the criminal penalties provided by the Act for violation of the Secretary's rules and regulations (Section 5(a)(2)), it would appear that the rule making procedural safeguards of the Administrative Procedure Act would be a wise prerequisite to any such action by the Secretary.[1]

[1] The Department recently has successfully employed the rule making procedures of the APA as a preliminary to drafting all regulations pertaining to the Outer Continental Shelf area. 19 F. R. 790—Feb. 16, 1954; 19 F. R. 2662—May 8, 1954.

The Act also makes no provision for an adjudication on the record after opportunity for an agency hearing, thus excluding Section 5 of the Administrative Procedure Act (5 U.S.C.A. § 1004). However, Section 5 of the Administrative Procedure Act was never intended to apply to "any matter subject to a subsequent trial of the law and the facts *de novo* in any court" (5 U.S.C.A. § 1004). The Shelflands Act in Section 5(b)(1) gives the Secretary the right to cancel a *non-producing* lease for failure to comply with the provisions of the act or regulations, apparently without a hearing, but the lessee under Section 8(j) may have the Secretary's action reviewed in the United States District Court for the District of Columbia by filing a petition for review within 60 days after the Secretary takes such action. In the case of default on the part of an owner of a *productive* lease, such lease may be forfeited and canceled only by appropriate proceedings in any United States District Court. As Section 4(b) describes the United States District Courts as courts of original jurisdiction and the Act contains no limitations on scope of review, apparently they would have *de novo* reviewing powers.

The National Committee of the Administrative Law Section of the American Bar Association has assigned a number of bills of the 83rd Congress to this Committee on Natural Resources and Interior Affairs. The following bills were assigned: H. R. 223, H. R. 312, H. R. 348, H. R. 357, H. R. 629, and H. J. Res. 126, which, after the passage of Public Law 31, and Public Law 212, elucidated above, have become dead letters. No action in the Congress upon these measures is currently being taken. At present there appears to be no pending legislation pertaining to submerged lands of administrative law interest.

3. *Grazing Lands*

*S. 31* introduced by Senator McCarran on January 6, 1953, was referred to the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs. It has received adverse reports from both the Bureau of Budget and the Interior Department.

S. 31 amends Subsection b of Section 18 of the Taylor Grazing Act (43 U.S.C.A. § 315 o-1(b)), by adding the sentence: "The Secretary shall not make any change in the fees payable for grazing livestock within any district unless the advisory board for such district has consented to such change." Section 3 of the original Taylor Grazing Act (43 U.S.C.A. 315 b) gave the Secretary of the Interior the power to fix and determine reasonable grazing fees. The original Act established grazing boards to advise the Secretary in enumerated matters concerning the grazing districts, but not including fees. Although under the original act the Secretary was obligated to consult the Advisory Board, there was no requirement as that contained in S. 31 that the Advisory Board's consent was mandatory to any action the Secretary deemed advisable.

*H. R. 6081,* introduced by Mr. Metcalf on July 2, 1953, to amend the Taylor Grazing Act, was referred to the House Committee on Interior and Insular Affairs where it is awaiting report from the Secretary of the Interior.

This bill amends Section 3 of the Taylor Grazing Act (48 U.S.C.A. § 315 b) by giving the Secretary of the Interior complete discretion over the issuance and/or removal of a grazing privilege, and Section 18(a) of that Act (48 U.S.C.A. § 315 o-1) by allowing the Secretary to appoint more representative district advisory boards. The amendments require the Secretary to appoint persons to the district advisory boards not only from the local stockmen of the district, but among all residents representing each of the important uses of the public lands, the appointed members to serve five-year staggered terms. Section 18(b) of the Taylor Grazing Act (43 U.S. C.A. 315 o-1) is amended by the proposed bill to first remove the necessity of the board offering advice and making recommendations on each application for a grazing permit within its district. Likewise, in place of the requirement of the original Taylor Act that each board

> ". . . shall further offer advice or make recommendations concerning rules and regulations for the administration of this chapter, the establishment of grazing districts and the modification of boundaries thereof, the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this chapter within the district,"

the new bill substitutes a provision that

> ". . . each board shall offer advice and make recommendations on such matters as the Secretary or his representative in their discretion shall refer to it."

Hence, in contrast to S. 31 mentioned, *supra.*, H. R. 6081 lessens the scope of the Advisory Board's field of recommendation. However, H. R. 6081 does require the Secretary to request the advice of the Advisory Board in advance of the promulgation of any rules and regulations affecting the district (Sec. 3(b)).

*S. 1491* introduced March 27, 1953, by Senator Butler of Nebraska (same bill, *H. R. 4023,* introduced March 17, 1953, by Mr. D'Ewart, has been referred to the Interior Committee where committee hearings in both the House and Senate have been held.

The bill proposes a revision of the public land laws "in order to provide for orderly use, improvement, and development of the Federal lands" in respect to Federal grazing, and states that the Act may be cited as the "Uniform Federal Grazing Land Act". Section 10(a) of the bill provides:

> "(a) Notwithstanding the provisions of Section 4 of the Administrative Procedure Act, such Act shall apply in the administration of this Act, except that nothing in the Administrative Procedure Act shall apply to the exercise by the Secretary of his powers under section 11 of this Act. All cases of adjudication arising under this Act shall be determined on the record after opportunity for agency hearing. An established grazing privilege as provided in section 6(a) of this Act shall be considered to be an activity of a continuing nature within the meaning of section 9(b) of the Administrative Procedure Act."

S. 1491, hence, makes the administration of Federal grazing lands, regardless of their being "public property", an activity subject to the procedural safeguards of the Administrative Procedure Act.

Section 10(b)(1) and (2) of S. 1491 subject the proposed uniform Federal Grazing Land Act to the provisions for judicial review found in the Act of December 29, 1950 (54 Stat. 1129; 5 U.S.C.A. 1031). That Act gives the United States Courts of Appeals exclusive jurisdiction to review and determine the validity of final orders of certain Federal agencies. Hence, under Sections 10(b)(1) and (2) a Federal Court of Appeals might enjoin, set aside, suspend (in whole or in part), or determine the validity of, all final orders of the Secretary of Agriculture or the Secretary of the Interior under the proposed Act, except any order issued pursuant to Section 11 giving the Secretary discretionary power to limit or discontinue the grazing use of lands to prevent their injury. This exception of Section 11 apparently would not overrule *Sellas v. Kirk* (cited *supra*, p. 6), wherein the plaintiff was denied judicial review of an order by the Secretary of the Interior limiting his grazing privileges to prevent injury to the lands in question, although that case was predicated upon the review procedures of Section 10 of the Administrative Procedure Act containing a similar exception for "agency action committed by law to agency discretion."

4. *Indians*

*P. L. 280, 83rd Congress, approved August 15, 1953.* This Act confers jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin over criminal offenses and civil causes of action committed or arising on most of the Indian reservations within those States. Its effect is to make the civil and criminal laws of those States, and the jurisdiction of their courts, applicable to a wide range of transactions that were formerly subject to the control of the Indian tribes themselves, and to a more limited range of transactions that were formerly within the cognizance of the Federal courts or the Department of the Interior. The Act qualifies the jurisdiction conferred by it in a number of respects. In particular, it expressly withholds from the States authority to alienate, encumber or tax trust or restricted Indian property; or to regulate the use of such property in a manner inconsistent with Federal treaties, statutes, or regulations; or to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property. Sections 6 and 7 of the Act contain provisions for the assumption of like jurisdiction by States other than the five named.

Several bills have been introduced in the Congress to revise and clarify the provisions of sections 6 and 7 of Public Law 280. Five of these (*S. 2625* introduced by Senator Murray on January 7, 1954, *H. R. 7193* introduced by Mr. Metcalf on January 14, 1954, *H. R. 7370* introduced by Mr. Berry on January 20, 1954, *S. 2790* introduced by Senator Case on January 20, 1954, and *S. 2838* introduced by Senator Goldwater on January 27, 1954) would permit States that are not named in Public Law 280 to assume criminal and civil jurisdiction, subject to the qualifications imposed by that Act, over those Indian reservations where the Indians agree to accept State jurisdiction through a referendum election at which a majority of the votes cast by enrolled members of the tribe are in favor of such jurisdiction.

Two more recent bills (*H. R. 9506* introduced by Mr. Berry on June 9, 1954, and

*S. 3597* introduced by Senator Watkins on June 11, 1954) would permit any State not named in Public Law 280 to assume jurisdiction, subject to the qualifications of that Act, over Indian reservations in the State upon fulfillment of the following conditions: (1) Full consultation by the Governor with each Indian tribe for the purpose of ascertaining its wishes in the matter; (2) Notification by the Governor to the Secretary of the Interior that the State has adopted affirmative legislation for the extension of its jurisdiction to the Indian reservations in the State; (3) A finding and determination by the Secretary, which is declared to be conclusive for all purposes whatsoever, that the exercise of State jurisdiction within Indian reservations would be in the best interests of the Indian tribes concerned and that the other conditions prescribed by the proposed legislation have been fulfilled; and (4) Publication of such finding and determination in the Federal Register. State jurisdiction would come into effect upon the ninetieth day after such publication. The Department of the Interior and the Bureau of the Budget have submitted favorable reports on H. R. 9506 and S. 3597, and these bills are understood to also have White House support.

5. *Study on Revision of Public Land Laws*

*S. J. Res. 108* was introduced July 27, 1953, by Senator Humphrey, referred to the Senate Committee on Interior and Insular Affairs, and reports requested by the Department of the Interior and the Bureau of the Budget. The Bureau of the Budget has reported no objection. The resolution proposes the establishment of a joint committee on natural resources to be composed of sixteen members, eight from the House and eight from the Senate. The duties of the joint committee are: 1) to investigate the operations and effects of all Federal statutes dealing with the natural resources of the United States; 2) to investigate the administration of such statutes by the responsible Government agencies; and 3) to make other investigations with respect to the conservation of natural resources of the United States as the joint committee may deem necessary.

*H. J. Res. 381,* introduced February 17, 1954, by Mr. Young, was referred to House Committee on Interior and Insular Affairs, where it has received no action to date. This joint resolution proposes the establishment of a bipartisan commission composed of nine members—three appointed by the President from Government or private life, three appointed by the President of the Senate from among the membership of the Senate, and three appointed by the Speaker of the House of Representatives from among the membership of the House—for the purpose of studying and investigating the public-land laws of the United States.

> ". . . to ascertain their effectiveness to accomplish the public-land policies of the Congress, to determine the need for consolidating, modernizing, simplifying, or re all or any of the laws and to recommend and prepare a modern, simple, and effective public land law system, including drafts of proposed legislation to accomplish these purposes."

*H. R. 8320,* introduced March 10, 1954, by Mr. Curtis, was referred to the House Committee on the Judiciary where reports were requested from the Department of the

Interior and the Bureau of the Budget. No action is planned by this session of Congress. This bill proposes to revise, codify and enact into law Title 43 of the United States Code, entitled "Public Lands". Extensive changes in administrative procedures are proposed by the bill.

Chapter 17 sets forth basic rules for contests and hearings. Section 251, under Chapter 17, subjects all proceedings in the Department of the Interior for the purpose of adjudicating "contested or protested entries or other claims involving the public lands" to the Administrative Procedure Act, to be administered "by officers of the Bureau of Land Management so empowered by the Secretary." "Decisions in such cases shall be made by the officers conducting the proceedings."

Section 252 disqualifies any hearing officer from conducting proceedings in which he is interested directly or indirectly, or has been of counsel.

Section 253 gives officers of the Department of Interior subpoena powers over witnesses for all proceedings under the Chapter. If the witness resides outside the county in which the proceeding is to be conducted, Section 254 allows the taking of depositions upon written notice of time and place to opposing parties. Witnesses and deponents under Section 256 are to receive fees and mileage as provided for in the United States District Courts.

The above hearing provisions of Chapter 17 are made applicable by Section 1111 to Grazing Claims under Part IV of the bill.

Chapter 15 codifies the law as to oaths in public land matters. Section 201 thereunder states as follows:

> ". . . written statement in public land matters within the jurisdiction of the Department of the Interior need not be made under oath unless the secretary shall so require."

The oath is not a prerequisite to criminal liability however as Section 202 provides that unsworn written statements within the Department's jurisdiction shall remain subject to sections 287 and 1001 of Title 18 (see p. 39 *infra*).

The overall purpose of the bill to codify all the myriad of public land laws with a view toward simplification and modernization appears to be a concrete step in the direction of the public land law revision studies proposed by S. J. Res. 108 and H. J. Res. 381, cited *supra*.

6. *Miscellaneous*

a. *Activities of Temporary Bureau of Land Management Employees*

*H. R. 1812*, introduced May 6, 1953, exempts temporary intermittent, or seasonal employees (if such employees did not work more than 180 days in each year), of the Bureau of Land Management from 43 U.S. C.A. Section 11, prohibiting their purchase of public lands. It also exempts any member of an advisory board of the Bureau or Land Management from the provisions of the Federal Conflict of Interests statutes. The bill passed the House on May 5, 1953 (H. Report No. 308) and has been referred to the Senate Committee on Public Lands where it has received a favorable report

from the Interior Department and a no-objection report from the Bureau of the Budget.

b. *Hawaiian Claims Commission*

*H. R. 6891,* introduced January 6, 1954, by Mr. Farrington, was referred to the House Committee on Interior and Insular Affairs, and reports requested from the Departments of Justice and Interior. The bill provides for the review and determination of claims for the return of lands, in the Territory of Hawaii, conveyed to the Government during the second World War by organizations composed of persons of Japanese ancestry. The Chairman of the three-man Commission is given authority under the bill to decide all questions of law, determine all motions, rule on the admissibility of all evidence. Factual questions are to be determined by the Chairman and the other Commissioners. Section 4 gives the Commission power to make rules relating to procedure before it, and to prescribe forms to be used, including the issuance of subpoenas. Section 5(c)(2) makes previous issues of law or fact finally decided by a court of competent jurisdiction *res adjudicata,* and precludes the Commission from hearing any issues of law or fact that are pending before a court of competent jurisdiction. Section 5(d) cuts off judicial review by making the decisions of the Commission final.

## IV Administration

The scope of this report is limited to the Department of the Interior which is the prime agency in the field of natural resources and interior affairs. An analysis of the Department's administrative procedures falls under two headings: (a) Departmental Decisions and (b) Proposed Procedural Changes.

A. *Department Decisions on Administrative Procedure*

1. *Adjudication*

As noted in this Committee's report of last year (5 Administrative Law Bulletin, No. 3, Aug. 1953) few of the acts that the Department administers require the Department to conduct a hearing on the record. Three decisions were noted in the report wherein the Department rejected claims of appellants for a hearing on the ground that Section 5 of the Administrative Procedure Act is limited to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing" (*Yukatat and Southern Railway,* A-26438 decided September 19, 1952; *Libbey, McNeil and Libbey,* A 26310 decided April 10, 1952; *Conn Pulos,* A-25872 decided August 4, 1950; see page 135-136, 5 Administrative Law Bulletin No. 3, Aug. 1953). Since this Committee's last report, the Department has continued to make similar rulings. In A-26720, *Libbey, McNeil and Libbey,* September 9, 1953, it held that the Soldiers Additional Homestead Entry Statute (43 U.S.C.A. § 274) does not require a determination on the record after an opportunity for hearing, and accordingly the appellant was not entitled to a hearing pursuant to Section 5 of the Administrative Procedure Act (5 U.S.C.A. § 1004). The decision sought further justification by stating"

> "No substantial issues of fact have been raised in this proceeding which

might justify holding a hearing to determine factual matters."

A-26684, A-26690, *Curtis Ferguson, et al.*, May 1, 1953. In this case the appellant alleged that the Bureau of Land Management wrongfully denied his request for a hearing. The decision by the Secretary on appeal held that there were no statutory provisions for a hearing with respect to the classification of public lands for an enlarged homestead entry (citing 43 U.S.C.A. 315f).

In A-26601, *Mary Volk, et al.*, May 5, 1953, the appellant contended that she was deprived of a hearing pursuant to Section 5 of the Administrative Procedure Act in her claim for an equitable apportionment on the sale of an isolated tract pursuant to Section 2455 of the Revised Statutes (43 U.S.C. 1171 Supp. V). The opinion held Section 5 of the Administrative Procedure Act inapplicable to the sale of an isolated tract, as under the Revised Statutes, no hearing was required and the Secretary was given complete discretion to sell or not to sell.

A-26769, A-26770, *Mrs. Jessie Gomez, J. H. Young*, November 16, 1953. In this case both of the appellants requested that a formal hearing be held for the submission of evidence to determine their conflicting grazing act preference rights. The Director of the Bureau of Land Management denied this request stating that each applicant had the opportunity to submit written material on appeal. The Secretary upheld the Director, citing the lack of a statutory requirement for a hearing and arguing further that

". . . no substantial issues of fact had been raised in the proceeding which might justify holding a hearing to determine factual matters."

However, in the few instances where the statutes have required a hearing, the Department has attempted to follow closely the Administrative Procedure Act. In A-24519, *Estate of Little Toby or Little Tobin, Round Valley, Allottee Nos. 577 and 1171*, February 14, 1947, the Department held the hearing requirements of the Administrative Procedure Act applicable to a probate hearing under an Indian "examiner of inheritance" (see Act of June 25, 1910, 36 Stat. 855; 25 CFR 81, et seq.). The petitioner put in a claim to the Acting Commissioner of Indian Affairs against the will of the deceased Indian Tobin for an alleged amount of care that she had given the deceased over a period of 19 years. The Acting Commissioner denied the petition saying there was a preponderance of evidence that the claim was without merit. His decision, however, was based on the personal knowledge of agency employees and from an examination of the files of the agency. Petitioner alleged that she was deprived of a hearing on the record. The Secretary reversed the Commissioner and ordered a rehearing, reasoning that every such claimant should be entitled to a full hearing on the merits which necessarily includes the right to cross-examine those who present evidence against the claim. The Secretary quoted the Administrative Procedure Act, Section 5(c) and Section 7(c) for the standards of a fair hearing which require that no hearing officer can consult any fact except on notice to all parties con-

cerned and must give an opportunity for rebuttal evidence and cross-examination.

Likewise, an "examiner of inheritance" is required to follow strictly the provisions of the Administrative Procedure Act with respect to the hearings given. In M-34818, *Memorandum to Chief of Probate Division, Office of Indian Affairs, from the Solicitor,* January 13, 1947, an opinion was rendered that an examiner of inheritance can take the testimony of absent witnesses without violating Section 5(c) of the Administrative Procedure Act only if the examiner announces at the original hearing, the time and place wherein the hearing will be resumed for the purpose of taking the testimony. Further, the opinion was expressed that the hearing examiner may take testimony by deposition after notice to interested parties pursuant to Section 7(b) of the Administrative Procedure Act. On such depositions, the interested parties are entitled to participate and prepare cross-interrogatories.

2. *Hearing Examiners*

As noted above, the Department does have hearing examiners who operate under the Bureau of Indian Affairs adjudicating the probate and inheritance of Indian wills. In M-36037, *Memorandum to Executive Officer, Bureau of Indian Affairs, from the Solicitor,* July 26, 1950, the issue was raised as to whether the duties of an examiner of inheritance and those of an area counsel could be combined in the same job. The memorandum analyzed Section 11 of the Administrative Procedure Act and concluded that a hearing examiner could not perform duties inconsistent with his responsibilities as an examiner. However, the Solicitor found the duties of area counsel and examiner of inheritance not inconsistent because the former is not empowered to perform or participate in any of the functions performed by the latter. Should demands for time conflict, the duties as hearing examiner must take first priority. The memorandum decision went further to state that the tenure and compensation of these hearing examiners is governed by Section 11 of the Administrative Procedure Act.

3. *Rule Making*

As pointed out in this Committee's report of last year (5 Administrative Law Bulletin, No. 3, August 1953, page 136-137), the Department of the Interior has construed the "public property" exception of Section 4 of the Administrative Procedure Act as removing the administration of the public domain from the requirements of rule making. The broad interpretation of "public property" used by the Department to exempt many of their operations from Section 4 of the Administrative Procedure Act caused difficulties when these same words appeared in other Federal legislation. In M-36128, *Memorandum to the Administrative Assistant Secretary from the Acting Solicitor,* April 21, 1952, the Bureau of Indian Affairs requested authority to sell the Menominee Indian Mills House No. 36 to a member of the Menominee tribe under Section 5 of the Menominee Indian Mills Act of 1908 (35 Stat. 51, 52). The question arose as to whether this Indian House could be sold pursuant to the 1908 Act after the passage of the Federal Property and Administrative Services Act of 1949 (63

Stat. 377, 41 U.S.C. 233), which applied to disposal of "public property". The conflict arose because the Secretary had construed "public property" as excepted from Section 4 of the Administrative Procedure Act to include property held in trust for Indians. To extract themselves from this dilemma the Department held that "public property" in the Administrative Procedure Act from its legislative history was intended to include Indian property, while the same phrase in the Federal Property and Administrative Services Act had no similar legislative background. In both instances the Department construed its activities as outside the scope of the respective acts.

Where unable to find an exception in Section 4 of the Administrative Procedure Act, the Department has held their functions ruled thereby (see M-34864, *Letter from Solicitor to Director, Fish & Wildlife,* February 18, 1947). In M-34737, *Memorandum to Assistant Director, Oil and Gas Division, from the Solicitor,* November 22, 1946, pertaining to the reinstatement of the obligation to submit monthly reports under the Connally "Hot Oil" Act, the Solicitor held that the action of the Federal Petroleum Board in granting or terminating relief from the submission of monthly reports is "rule making" as defined in the Administrative Procedure Act and subject, therefore, to the procedural requirements of Section 4, of that Act. After consulting the public pursuant to Section 4, however, the Board would be free to actually formulate its rules upon the basis of materials in its own files and the knowledge and experience of the agency, in addition to the materials adduced in public rule making procedures.

An overall analysis of the decisions by the Department reveals little change in actual procedural practice since this Committee's last report of August 1953 (*supra*); however, the Department has formulated proposed changes in its administrative procedures which, if enacted, will institute extensive reforms.

### B. *Proposed Departmental Procedural Changes*

In this Committee's report of August 1953 (5 Administrative Law Bulletin, No. 3, August 1953), a number of deficiencies were noted in the Department's administrative processes (see pages 132-134). On October 16, 1953, the Department established a survey team to study the organization and operations of the Bureau of Land Management. On December 18, 1953, the survey team completed its report and made extensive recommendations for changing the procedures of the Bureau of Land Management, including recommendations pertaining to adjudication, hearings, and appeals. On January 26, 1954, the bulk of the recommended changes were approved by the Secretary, who ordered that the Bureau of Land Management in cooperation with the Solicitor:

> ". . . work out the steps required to put into effect the hearings and appeals procedure as recommended in Appendix F."

The Department also appointed a survey team of the Solicitor's Office. This team completed its report on February 5, 1954. The Secretary in a letter of February 9, 1954, requested the Solicitor to implement the recommendations made by the survey

team at the earliest possible opportunity. Hence the recommendations of both the Solicitor's survey team and the Bureau of Land Management's survey team have been accepted and approved by the Secretary of the Department. However, until these recommendations are actually put into effect or codified in the Departmental regulations, they can only be considered as "proposed" changes.

The new proposed changes may be analyzed best by comparing their procedural advantages with deficiencies of the former departmental procedures as noted in this Committee's report of August 1953 (5 Administrative Law Bulletin No. 3).

1. *Adjudication*

a. *Lack of a Hearing*

This Committee noted that the Bureau of Land Management's regulations permit the rejection of applications for oil and gas leases under the Mineral Leasing Act, petitions for classification under the Homestead Act and for various other interests under public land laws after *ex parte* proceedings without a hearing (p. 132, 5 Ad. Law Bull. No. 3, Aug. 1953).

On page 18, Section VI B-2, the survey team of the Bureau of Land Management noted the "lack of any opportunity for rejected applicants to have a hearing excepting grazing and mineral patent cases." Appendix F of the Survey (page 32) proposes that the general regulations of the Bureau of Land Management relating to practice (43 CFR, Parts 220-223) should be amended to provide for the following plans and procedures: First, the local Land Office should make what is denominated as a "first decision". This first decision should be rendered without a hearing, but the applicant and any other interested party should be properly notified in writing, by mail, of the decision. This initial decision parallels the present practice, but the Survey team then recommended the establishment of a new position within the Bureau of not less than three nor more than five "Field Commissioners". The functions and duties of the Field Commissioners are to hear and determine issues of fact and of law that are referred to them after the first decision or that may be assigned to them by the Director. Upon notice of the first decision, an aggrieved party may, by written request within 30 days, elect (a) to have the case referred to a Field Commissioner for a hearing and determination of the facts and law, or (b) to appeal on the record then made directly to the appeals unit in the Office of the Solicitor. Should the case be referred to a Field Commissioner for a hearing, it would be assigned by the direction of the Director to a Field Commissioner and set for a place and time as near as practicable to the office of first decision. A stenographic record is required to be made of all testimony before the Commissioner. Pretrial arrangements and conferences for the purpose of stipulating facts and issues shall be wholly within the discretion of the Field Commissioners assigned to the case. Further, the provisions of the Grazing Code with respect to the proceedings before hearings examiners (Sec. 161.9 (f to k inc.) Title 43, CFR) shall, so far as applicable, be followed. In recommendation IX-D (page 25), the State Land Offices are to be strengthened to handle all Federal

land and mineral matters arising within the State boundary. As noted, their first decision will be made without a hearing. Under the old system a rejected applicant had the right to appeal to the Director of the Bureau of Land Management, and subsequent to that, the right to appeal to the Office of the Secretary of the Interior. However, at no time did he have the right, except in limited cases, to a full hearing on all the facts and evidence in the case. The new procedure gives an applicant the right to a hearing if he desires, although admittedly this hearing is after an initial *ex parte* decision by the local office upon the merits of his case. While this may not be as satisfactory as an initial hearing upon the record, the proposed solution appears to be a workable compromise to enable the rapid adjudication of the routine cases yet reserving to an interested party the right to a hearing upon the record if he should so desire.

Should a hearing be requested, the procedure to be followed as set forth in the proposed amendments is that now governing hearings under the grazing laws (Title 43 CFR, Sec. 161.9 (f to k inc.)). These regulations appear to follow and fully satisfy the procedural safeguards of a hearing as set forth under the Administrative Act.

The proposed new position of "Field Commissioner" is really that of a hearing examiner. Appendix F of the Land Management Survey Report states that these Field Commissioners are "to serve under the direct control and supervision of the Director". It is submitted that this proposal should be modified to equate the new Field Commissioners with other Federal hearing examiners either under Section 11 of the Administrative Procedure Act or under the provisions of S. 1708, 83rd Congress, should it become law.

b. *Secrecy of Files*

Another criticism of the former Bureau's processes was the secrecy of certain portions of the file by marking them "Confidential", thus closing them to inspection by the applicant and his attorney. This defect as described in the Committee's last report was noted in the BLM survey team in paragraph VI-B-2, page 18, which stated:

> "Inability of an applicant to see files. This is based on a practice of marking 'Confidential', papers on which adverse decisions are often based. This complaint applies particularly to the field examiners' reports which are usually the basis of the first (Manager's) decision."

To correct this, Appendix F (page 32) of the new proposed regulations provides that after the first decision has been entered, the applicant should be properly notified by mail of the decision, and

> ". . . the notice should also apprise the applicant of his right to inspect any reports on which the decision is based and that he has a right to a hearing or to a direct appeal."

Accordingly, under the new proposed regulations, all applicants will have the right to inspect any reports on which the decision was based.

c. *Independent Administrative Review*

Another deficiency noted in the Department's procedures by this Committee's last report was the general lack of provision for

completely independent Departmental review of administrative determinations. To meet this deficiency the new proposed regulations (Appendix F, C-2) provide that:

> "All appeals should be on the record, whether by direct appeal from 'first decision', or upon the transcript and exhibits from the findings and conclusions of the Field Commissioner."

Conferences between lower echelon attorneys in the Bureau of Land Management and the attorneys in the Solicitor's office on the merits of a particular case would be unlikely under the new proposed regulations [1] From an initial decision in a local land office the applicant could appeal directly to the Appeals Branch of the Solicitor's Office in Washington, D. C., or request a hearing before a Field Commissioner. After a hearing, he again has the right to appeal. In either case, there would be little opportunity for conferences out of the presence of the applicant, between the trial level at the local land office (or hearing examiner), and the appellate level in the Solicitor's office. Recommendation No. 6 of the Solicitor's Survey Team (page 2) recommended "a free flow of intercommunication among senior attorneys in the Washington office and between the Washington and field officers." However, this recommendation should be construed to prevent off-the-record consultation about an individual case.

d. *Sufficiency of Decisions*

The deficiency was noted by this Committee's last report that applicants before the Department in public land cases have in some instances been faced with allegations by Department attorneys having an adverse bearing on their applications without being advised of the basis or origin of such allocations. Appendix F of the proposed general regulations for the Bureau of Land Management provides:

> "If the decision is in any respect adverse, the notice should clearly and succinctly set forth the reasons and if reference is made to any statute or regulation, the point covered thereby." (A 3, a.)

Such a requirement in a new regulation would force the local Land Office in its initial decision to correct the abuse of failing to cite the source of authority, either in law or in fact that their decision is based upon. Section 161.9(i) would require the Field Commissioners to make findings of fact and conclusions of law upon every material question of fact, law, or discretion found in the record. (43 CFR).

e. *Statements Under Oath*

A deficiency was noted by this Committee that the Department tends to accept statements from persons bearing on material facts in matters under adjudication without requiring such statements to be under oath. The Department answers this deficiency by referring to the provision of the United States Criminal Code found in Title 18, Section 1001:

> "Whoever, in any manner within the jurisdiction of any Department or agency of the United States knowingly and willingly falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious or fraudulent state-

[1] Under the new reorganization, noted *infra* pages 41-42, all the Department's Washington attorneys will be housed as one unit under the Solicitor's Office.

ments or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned more than 5 years, or both."

Under this section it is not necessary that the statement or other false matter be under oath. Accordingly, the Department concludes that all statements made to it while operating within its sphere of jurisdiction would be under the scope of this section of the United States Criminal Code. It is suggested that the departmental regulations pertaining to witnesses and hearings specifically point out these criminal provisions.

f. *Delay of Adjudication*

This Committee's last report noted the large backlog of cases in the Department, mandating considerable delay on adjudications. This problem received lengthy attention from the BLM survey team (see VI-A, page 17-18). The survey team's proposed plan of correction provides (Appendix E, BLM Survey Team, December 18, 1953):

(1) The establishment, under expert advice, of an overall receiving and docketing system, to record every matter leading to decisive action (case), as it first enters the Bureau. Thereafter an extensive recording and indexing system, kept in chronological order, of action taken, follows the case throughout the Bureau.

(2) A tie-in of the recording system with the Land and Use Records, so that serial numbers will appear on or in connection with the plat books, and orders and decisions will be promptly recorded on or in connection with the Land Records.

(3) The establishment of a new position of docket control officer whose duty would be to control the above described docket system and to make reports and recommendations to the Director for expediting the work by assignment of cases and distribution of work load.

(4) That the docket officer make an inventory of all cases currently pending.

(5) That based upon the age of the cases in the various categories as disclosed by the inventory, the docket should be cleaned up immediately by (a) redistributing the work load including all grades of personnel, and (b) assigning temporary help to assist in processing the case either as adjudicators or as clerks. In this regard the BLM survey recommends that the new Field Commissioners be "broken in" by first serving as adjudicators in cleaning up the backlog.

The Survey Team for the Solicitor's Office has recommended changes with a view toward reducing the backlog. A major change is that the Washington staff of attorneys should be integrated into one unit and housed together under the direct line of authority leading to the Solicitor (Recommendations Nos. 1 and 2, Solicitor Survey Team Report, February 5, 1954). As stated in the Survey Report, one purpose of this integration is to permit the shifting of attorneys to equalize the work load. The Solicitor's Survey Team further recommends the adoption of the Bureau of Land Management's Survey Team proposed appellate procedure (Appen. F-C) for all ap-

peals in the Department where not otherwise provided by statute (Recommendation No. 4). But the adoption of this procedure and the establishment of an Appeals Unit in the Solicitor's Office is recommended only if it will "not delay final clearance of the backlog of appeals."

g. *Failure to Publish Decisions*

The last volume of published Departmental decisions is Volume 59, covering part of 1947. Since that date decisions may only be obtained by a personal trip to the Department's Docket Room where only the employees are allowed access to the index and decision files. The Solicitor's Survey Team Report indicates that even the Department's own attorneys are unaware of the various opinions rendered (page 12). Many decisions are found on the same point, which, had the earlier opinion been available, might have precluded the appeal. Recommendation No. 10 of the Solicitor's Survey Team suggests the indexing and publication of opinions for all "interested attorneys".

h. *Judicial Review*

This Committee's last report noted the failure of many natural resource statutes to provide for judicial review of Departmental acts. None of the proposed recommendations by either the Bureau of Land Management Survey Team or the Solicitor's Survey Team contains any specific reference to the question of judicial review. The problem, however, is legislative or judicial rather than administrative.

i. *Rule Making*

None of the recommendations by either the Bureau of Land Management Survey Team or the Solicitor's Survey Team proposes any changes with reference to the Department's rule making procedures. The Grazing Act regulations with respect to hearings are proposed for adoption, but no mention is made of that Act's salutary requirement of public consultation prior to rule making.

## V Recommendations

It is recommended that the proposed changes in hearing and appeals procedure, coupled with the plans for elimination of the case backlog, as set forth in Appendixes E and F of the Bureau of Land Management Survey Team Report, and Recommendations 1, 2, and 4 of the Solicitor's Survey Team Report, as approved by the Office of the Secretary, be endorsed by this Committee. If enacted, the proposed changes will cure many of the deficiencies in departmental procedures noted by this Committee's last report (see supra IV B), and bring procedures on hearings and appeals within the spirit of the Administrative Procedure Act, and due process of law. In this connection, the Department has invited this Committee to study, advise, and consult on a draft of material intended to make the procedural changes pertaining to BLM applicable, if possible, to all or most of the activities of the Department. It is recommended that the Committee be given the authority to participate in this matter and a resolution providing such authority is attached.

Analyses of the problems of administrative law with respect to natural resources and interior affairs that have arisen in the courts, the Congress and the Department, reveal a need for further procedural recommendations:

a) That the Department adopt the rule making provisions of Section 4 of the Administrative Procedure Act for the formulation of all extramural rules and regulations of general public interest, relating to the public lands.

b) That further study be given to Judicial Review of Administrative action to determine the adequacy or inadequacy of present reviewing methods.

c) That pending legislation for a revision and codification of the public land laws be further studied for procedural aspects.

d) That the Interior Department opinions be properly indexed and published, either by arrangement with a legal service publisher or by appropriate allocation of Departmental funds.

e) That the proposed "Field Commissioners System" be adopted and further study be given to the desirability of treating the field commissioners as hearing examiners either under Section 11 of the Administrative Procedure Act or under the provisions of the pending bill, S. 1708, 83rd Congress.

Respectfully submitted,

For the Committee,
Northcutt Ely, Chairman

## PROPOSED RESOLUTIONS

1. BE IT RESOLVED, that the American Bar Association approves in principle the proposal by the Department of Interior for regulations to provide a full hearing pursuant to the requirements of the Administrative Procedure Act before a hearing examiner, for cases arising under the jurisdiction of the Bureau of Land Management, when such a hearing is requested by any interested person who shall feel himself aggrieved by any initial decision rendered by a field or local office of the Bureau of Land Management, and authorizes the Section of Administrative Law to appear before the Department of Interior to take such steps as it deems appropriate to support the proposal, as well as the possibilities of extending these procedures to other Bureaus of the Department.

2. BE IT RESOLVED, that the American Bar Association believes that the Department of Interior should adopt the rule making provisions of Section 4 of the Administrative Procedure Act in all of the functions of that department (exclusive of those pertaining to agency management or personnel), relating to the administration of public lands, when it is a matter of general public interest, and authorizes the Section of Administrative Law to appear before the Department of Interior and to take such other steps as it deems appropriate to support the proposal.

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Washington 25, D. C.

June 22, 1954

Northcutt Ely, Esquire
Tower Building
Washington 5, D. C.

Dear Mr. Ely:

I have hurriedly scanned the proposed report of the Committee on Natural Resources and Interior Affairs, and particularly some of the cases therein cited.

I am sure you know that I have a phobia for getting this Department under enough control that it is complying in all respects with the requirements of notice, hearing, etc., as contemplated by the Administrative Procedure Act.

I will not be able to attend the meeting, but Mr. Reuel Armstrong, Associate Solicitor, will attend. Mr. Armstrong is also a member and has been acting for me on the President's Committee on Administrative Procedure. We want to do in Interior everything that can be done, as a practical matter, to conform to the Act.

We do have our problems. For instance, as you may know, the first case cited in the memorandum, that is, *Hotch v. United States*, involving certain closing hours for commercial salmon fishing, is an excellent example of some of the problems we face. In the regulation of that industry no one can tell more than two or three days in advance as to the size of the fish run, its location, etc. Furthermore, even after instructions have been regularly issued, the run may be much more than anticipated and the regulations should be loosened up or vice versa. The fishermen rely entirely on radio news, and the order in question in that case was extensively broadcast over Alaskan waters. It is physically impossible to have those orders, as they are issued from day to day or at most from week to week, published in the Federal Register. It has seemed to me that they really were administrative orders and in the nature of things did not require publication, but the Court thought otherwise.

This is an example of the problems that arise if you try to subject all of the processes of Interior to complete compliance with the Administrative Procedure Act. You know perhaps better than I how far flung and distant from the Federal Register so many of the activities of the Interior Department are.

Subject, therefore, to these very practical things, to which there may be an answer that has not occurred to me, my position is firmly for the full compliance with the Act at all times, and we anticipate giving all of the regulations of the Department a careful going over to see that the procedures are amended to make compliance possible.

With this background of my personal views, I will be very happy for Mr. Armstrong to collaborate with you to make them effective, as far as possible.

Sincerely,

/s/ Clarence A. Davis
Solicitor

## COMMITTEE ON ORGANIZATION AND BY-LAWS

At the Annual Meeting of the Administrative Law Section held in Boston, Massachusetts, August 1953, the Council adopted

resolutions directing the Committee on Organization and By-laws (1) to examine the subject matter and general set-up of the Section and to submit a report to the Council at its mid-winter meeting, with recommendations as to whether an organizational change is justified, and (2) to work out a description of the function of a Committee on Government Contracts for presentation to the Council at its mid-winter meeting with consideration being given to whether such committee should be a .special committee, a standing committee, and whether the subject matter called for establishment of two committees.

Pursuant to the directive, a draft report was prepared and presented to the Council at the mid-winter meeting in Atlanta.

The following resolutions, based upon the recommendations of this Committee, were adopted by the Council on Saturday, March 6, 1954.

FIRST RESOLUTION

RESOLVED, (a) That the Committee on Government Contracts be abolished.

(b) That the following new committees on particular federal activities be established within the Section:

Committee on Public Contracts

Committee on Termination of Public Contracts (Special)

(c) That the following new committees on particular legislation or proposals be established within the Section:

Committee on Good Faith Reliance Act, (Special)

Committee on Judicial Review

(d) That the various committees of the Section shall perform the following functions (new committees established by parts (b) and (c) of this resolution indicated by underscoring):

COMMITTEES ON PARTICULAR FEDERAL AGENCIES OR ACTIVITIES:

Advertising, Trade and Securities Regulation

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions and practices relating to Advertising, Trade and Securities Regulations, and to report and recommend to Council through the National Committee.

Agriculture, Food, Drugs, and Related Subjects

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions and practices relating to Agriculture, Food, Drugs, and related subjects, and to report and recommend to Council through the National Committee.

Communications

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions, and practices relating to communications (including Post Office Department Matters), and report and recommend to Council through the National Committee.

Comptroller General—General Accounting Office

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions and practices relating to the Comptroller General and the Gen-

eral Accounting Office, and to report and recommend to Council through the National Committee.

Emergency Agencies (Special)

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions and practices relating to agencies created as a result of wartime legislation, and to report and recommend to Council through the National Committee.

Gas and Electric Power

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions, and practices relating to Gas and Electric Power, and to report and recommend to Council through the National Committee.

Immigration and Naturalization

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions, and practices relating to immigration and naturalization, and to report and recommend to Council through the National Committee.

Labor

The purpose of this committee is to study the procedural aspects of the laws, regulations, court and administrative decisions and practices relating to Labor, and to report and recommend to Council through the National Committee.

Natural Resources and Interior Affairs

The purpose of this committee is to study procedural aspects of the laws, regulations, court and administrative decisions, and practices relating to Natural Resources and Interior Affairs and to report and recommend to Council through the National Committee.

*Public Contracts*

The purpose of this committee is to study procedural aspects of the laws, regulations, court and administrative decisions and practices relative to federal government contracts (exclusive of matters involving renegotiation, finality clauses, and termination of government contracts), and to report and recommend to Council through the National Committee.

*Termination of Public Contracts*

(Special)

The purpose of this committee is to study existing procedural aspects of the laws, regulations, court and administrative decisions and practices relative to termination of federal and state public contracts, with a view to recommending improvements therein to insure fair, fast, and final settlement of termination claims under government contracts, and to report and recommend to Council through the National Committee.

Transportation

The purpose of this committee is to study procedural aspects of the laws, regulations, court and administrative decisions, and practices relating to rail, motor, water, and air transportation, and to report and recommend to Council through the National Committee.

## COMMITTEES ON PARTICULAR LEGISLATION OR PROPOSALS

Administrative Practitioners—
Admission and Ethics

The purpose of this committee is to study legislation and legislative pro-

posals concerning practitioners, both lawyers and non-lawyers, before administrative agencies, the requirements for admission, ethics, licensing and disciplining of such practitioners, and to report and recommend to Council through the National Committee.

Administrative Procedure Act

The purpose of this committee is to study all developments respecting the Administrative Procedure Act, particularly with reference to administration of the Act by the federal agencies, and to report and recommend to Council through the National Committee.

Code of Conduct of Government Employees (Special)

The purpose of this committee is to study all developments respecting the establishment, by legislation or otherwise, of a code of conduct for government employees, and to report and recommend to Council through the National Committee.

Administrative Agency Fees and Charges (Special)

The purpose of this committee is to study all developments respecting the establishment of fees and charges by government agencies under authority of the Independent Offices Appropriation Act of 1952, and otherwise, and to report and recommend to Council through the National Committee.

Finality Clauses in Government Contracts (Special)

The purpose of this committee is to study legislation and legislative proposals concerning finality clauses in government contracts, and to report and recommend to Council through the National Committee.

*Good Faith Reliance* (Special)

The purpose of this committee is to study legislation and legislative proposals concerning the enactment of a good faith reliance law, and to report and recommend to Council through the National Committee.

Hearing Examiners

The purpose of this committee is to follow the activities of the Civil Service Commission and the federal agencies in their selection and qualifications of examiners and to follow and study at intervals the administration of Section 11 of the Administrative Procedure Act to see that the qualifications of examiners are adequate, and to follow the activities of the federal agencies in the appointment of examiners; and to study legislative and administrative proposals with respect to this subject, and to report and recommend to Council through the National Committee.

Improvement of Administrative Procedures

The purpose of this committee is to follow all legislative, administrative, and executive proposals designed to improve administrative procedures except where the subject matter is specifically assigned to some other committee of the Section, and to report and recommend to Council through the National Committee.

*Judicial Review*

The purpose of this committee is to study all federal and state legislative and administrative proposals with respect to judicial review of federal, state and municipal administrative activities; to follow court and administrative decisions, and to report and recom-

mend to the National Committee where the subject matter involves federal judicial review.

Statutory Renegotiation (Special)

The purpose of this committee is to study all proposals, legislative and otherwise, respecting statutory renegotiation of government contracts, and to report and recommend to Council through the National Committee.

GENERAL AND MISCELLANEOUS COMMITTEES:

Administrative Law Bulletin

The purpose of this committee is to edit and prepare the Administrative Law Bulletin.

Annual Meeting

The purpose of this committee is to make such arrangements as are necessary to facilitate the program for the annual meeting.

The National Committee

The function of the National Committee is to keep itself and Council currently informed on any developments in the field of Federal Administrative Law; to coordinate and cooperate with other committees of the Section concerning legislative and other matters; and to represent the Section with respect to such developments when so required. It is the further function of the National Committee to coordinate the work of the committees on Particular Federal Agencies and Activities, and the committees dealing with Particular Legislation or Proposals (when the activities of the second group of committees mentioned relate to federal activities). The National Committee also represents the Section on matters in Congress in which the Section may be interested and serves as a Washington Committee.

Organization and By-Laws

The purpose of this committee is to study the structure, function and work of the various committees of the Section, and the Section and make recommendations to the Chairman from time to time in the interest of correlation of the work of the Section, and when called upon to serve as a drafting committee for such measures as are necessary for the operation of the Section.

Publications

The purpose of the Publications Committee is, when practicable, to publish such publications as may be desirable, for distribution to members of the Section for the purpose of affording a necessary means of communication between Section members for better transaction of Section business, and, for the purpose of affording Section members information concerning current developments in administrative law.

Section Development

The purpose of this committee is to promote interest in the work of the Section, to secure new members for the Section, and to promote maintenance of membership.

State Administrative Law

The purpose of this committee is to study the problem presented by state administrative law, to report on legislation enacted upon the subject of state administrative procedure, and to study state administrative and court decisions relating to administrative law (except where the subject matter has been assigned to some other committee of the Section.

SECOND RESOLUTION

RESOLVED, (1) That in all instances in which the committees of the Section are abolished or new committees of the Section are established, the facts with respect thereto shall be made known to the Committee on Organization and By-Laws of the Section, and that committee shall keep a record of the history of the organization of the Section.

(2) That the Committee on Organization and By-Laws shall present a comprehensive report on the organization of the Section of the Council, with recommendations as to changes if they are desirable, at the mid-winter meeting of the Council at least once every two years, beginning in 1954.

The Council did not approve a proposal for establishing a special committee on Pretrial Procedure.

This Committee also recommended to the Council, at its mid-winter meeting, the adoption of a resolution relating to the Committee on Code of Conduct of Government Employees (under the recommended resolution, the Committee on Code of Conduct of Government Employees would have been authorized, in its 1954 fall report to the Section, to include a recommendation that its work be transferred to some other section or committee of the Association). The reasons for this recommendation are set forth fully on pages 14-16 of the report dated February 19, 1954, which this committee filed with the Council at its mid-winter meeting in Atlanta. At the Atlanta meeting, the Council deferred action on this recommendation until the report of Mr. John McIntire, Chairman of the Committee on Code of Conduct of Government Employees, is received (presumably this will be at the Annual Meeting this fall).

The Council adopted a resolution to amend Article III, Section 2 of the By-laws to provide that the Section Delegate, along with the elected members, shall be an ex-officio member of the Council. The proposed amendment reads as follows:

> RESOLVED, That Article III, Section 2 of the By-laws be amended to read as follows:
>
> Section 2. There shall be a Council, which shall consist of the Chairman, the Secretary, and the Section Delegate, all of whom shall be members ex-officio, together with eight other members to be elected by the Section as hereinafter provided.

The Council also directed that the Committee on Organization and By-laws study and report at the Annual Meeting whether Article VI, Section 1 of the By-laws should be amended to provide that where an emergency arises between meetings, the Council be authorized to act on behalf of the Section, and any action so taken be reported to the Section not later than the next regular meeting of the Section. This Committee has given this matter consideration and recommends no changes in Article VI, Section 1 of the By-laws along these lines. It appears to this Committee that the Council has wide powers to act for the Section by virtue of the provisions of Article VI of the By-laws, and that it is unnecessary to add a provision providing that the Council may act for the Section between meetings when an emergency situation arises. The matter may, however, be given further

study, and, if there is some good reason for such a provision being adopted, action can be taken to do so.

By way of summary, this Committee presents the following matters for the specific consideration of the Section at the Annual Meeting:

(1) The adoption of the By-laws set forth above, to provide that the Section Delegate, along with the elected members, shall be an ex-officio member of the Council.

(2) The matter of whether the Committee on Code of Conduct of Government Employees should be abolished and its activities transferred to some other section or committee of the Association.

(3) With respect to the By-laws of the Section, it is the understanding of this Committee that an up-to-date copy of the By-laws is being printed as part of the Manual prepared by Mr. Robert Benjamin. The Committee feels that the Secretary of the Section should communicate with the Headquarters of the Association to make certain that the Association has a correct copy of the Section By-laws on file, in view of the discrepancies, to which attention was called in the report of this Committee published in the August 1953 issue of the Bulletin, Vol. 5, page 3.

Louisa Wilson, Chairman
Jesse E. Baskette, Vice Chairman

July, 1954

## COMMITTEE ON PUBLIC CONTRACTS

The principal activity of the Committee has been the study of the rules and procedures of administrative agencies operating under the provisions of the standard Disputes-Appeals Clause included by administrative regulation in all Government contracts. On the basis of the study made to date, and for the reasons hereinafter set forth, the Committee recommends approval of the following resolution:

RESOLVED that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

BE IT RESOLVED that it is the opinion of the American Bar Association that no Government contract should contain a Disputes-Appeals Clause making administrative appeal obligatory upon the contractor, but that such administrative appeal should be at the option of the contractor; and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

BE IT RESOLVED FURTHER that it is the opinion of the American Bar Association that administrative agencies having the power to decide disputes as to questions of fact arising under contracts with the Government pursuant to the provisions of the Disputes-Appeals Clause contained in such contracts, should have the power to subpoena witnesses and to administer oaths or take affirmations in lieu thereof; and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

Your Committee initiated its study of the rules and procedures of contract appellate agencies in April of this year. The adoption of Public Law 356, 83rd Congress, 2nd Session, which was approved by the President on May 11, 1954, served to emphasize the importance of the study. This legislation was ably furthered by the Committee on Finality Clauses of this Section and represents a forward step in the field of judicial review. In making this study, the Armed Services and the Armed Services Board of Contract Appeals have cooperated fully with your Committee. A number of meetings have been held with representatives of these agencies at which information has been obtained and views exchanged. At the present time, proposed amendments and additions to the rules of the Armed Services Board of Contract Appeals to bring them in line with the provisions of Public Law 356 and the recommendations of the President's Conference on Administrative Procedures are being considered by the agencies and by this Committee. It is expected that the Committee will be in a position to make recommendations concerning these rules to the Council through the National Committee before the 1955 Mid-winter Meeting.

In the meantime, the Committee's attention has been invited to other procedural and substantive problems involving disputes arising under Government contracts which the Committee believes require action by the Section at this time. The first of these is the absence of statutory authority in Government contract appellate agencies to compel the attendance of witnesses at hearings and to administer oaths or take affirmations in lieu thereof. These agencies have had to rely upon the voluntary appearance of witnesses and the provisions of the Federal Statutes relating to the making of false claims against the Government as a basis for warning interested witnesses of the penalties of false swearing. But these provisions do not apply to other witnesses, and it is doubtful that they could be subjected to penalties for perjury, as the Statute (18 USC 1621) applies only in cases in which the laws of the United States authorize an oath to be administered.

The second of these problems is the time-consuming, expensive and inconclusive nature of many of the administrative appeals required by the Disputes Clause. This clause makes the decisions of Contracting Officers as to disputed questions of fact final and conclusive unless appealed to the Secretary or Head or the Department concerned, or his duly authorized representative, within thirty (30) days. The decision of the latter, generally rendered by an appeal board after a trial de novo, is final and conclusive under the provisions of Public Law 356, *supra,* only if supported by substantial evidence and not arbitrary, capricious, fraudulent or so grossly erroneous as to imply bad faith. The required appeal is held by the courts to constitute an "administrative remedy" which must be exhausted by the contractor before he can go to court. See *Silas Mason Company vs. United States,* 90 C.Cls. 266, for a collection of cases so holding.

In many cases contractors welcome this opportunity for administrative review. In many other cases this so-called administra-

tive remedy becomes an intolerable burden upon the contractor. Decisions as to questions of law have no finality or conclusiveness, and contractual provisions to that effect are prohibited by Public Law 356, *supra.* Therefore, it would not be necessary to take an administrative appeal from a decision on a question of law, if the Contracting Officer presumed to make such a decision. There is, however, no clear-cut line between questions of law and questions of fact in most cases and, therefore, the contractor is bound in self-protection to appeal every dispute. In these cases, and in many other cases, the contractor would prefer not to be obliged to take an administrative appeal because the time and cost incident thereto are as great as a trial in the courts, and the results are far less conclusive; plus the additional fact that if the administrative appeal is unsuccessful he must go to the court anyway, try his case de novo and expend a duplicate or greater amount of time and money in his court action, thus doubling the cost of his litigation.

It is not the thought of this Committee to deprive any contractor of any right of appeal now available under the Disputes Clause. On the other hand, this Committee is aware that there are many cases where the contractor would prefer to go directly to the courts following his dispute with the Contracting Officer. This is particularly true of many construction contracts where the claims are numerous, the testimony expert and technical, the cost of preparation and presentation at hearing substantial, the overall time involved comparable to that required to present the case in the Court of Claims or a United States District Court, and where the decision of the court is conclusive of the litigation.

Illustrating this point is the fact that many Government contracts require, following the dispute with the Contracting Officer, an appeal to the Head of the particular Contracting Agency; and upon dissatisfaction by the contractor with the result of that appeal, a second appeal to the Secretary or Head of the Department concerned, or his authorized representative. In the case of the Defense Department, these final appeals go to the Armed Services Board of Contract Appeals. Neither of these administrative agencies has the power to render a judgment. In many cases decisions in the contractor's favor must be referred back to the Contracting Officer for settlement or determination of the amount. Inability to agree with the Contracting Officer results in another administrative appeal. Failure of the Contracting Officer, in such a case, to come to a decision on the amount within a reasonable time further delays the case. If agreement cannot be arrived at eventually on the figures, or on any other question of fact in dispute, the case may go to the Court of Claims anyway, for if the Appeal Board sustains the contractor's position the Contracting Officer or Disbursing Officer may, nevertheless, if he disagrees, refer the matter to the Comptroller General for review. If the Comptroller General reverses, as he may, (see *House Report No. 1380,* 83rd Congress, 2nd Session, p. 7—which accompanied P. L. 356—S. 24), the contractor must sue on the decision in his favor. If the Board sustains the Contracting Officer, the contractor may, nevertheless, bring his action in the

Court of Claims. When it arrives there, after several years spent in administrative proceedings, the case is stale. Witnesses are no longer available or, if available, they cannot recall important facts.

Thus it will be seen that the contractor can be required, in exhausting his administrative "remedy" to resort to several appeals, all fruitless in the end, with all the expense and delay incident thereto.

Therefore, it is your Committee's view that the administrative appeal should be optional; contractors who favor it should be permitted to take it; contractors who feel that it would be an unwarranted burden and expense should be permitted to have their day in court without delay.

Respectfully submitted,

/s/ Robert S. Moss
Robert Sheriffs Moss
Chairman

/s/ Bernard J. Gallagher
Bernard J. Gallagher
Vice-Chairman

## COMMITTEE ON SECTION DEVELOPMENT

The work of Section Development emphasizes that it is necessary to constantly obtain new members for the Section and also make it worthwhile for present members to continue.

*New Members*

In membership work, no better plans have been evolved this year than personal approach and the chain packet letters developed by F. Trowbridge vom Baur and John W. Cragun. Suggestions as to other techniques or improvements in these two plans will be greatly appreciated.

*Retaining Members*

The problem of retaining members is simply one of making it worth their while to continue in the Administrative Law Section. The Section has done and does do what it can for the members through:

A. Representing the interest of the Bar in Administrative Law matters,

B. Preparing a compendium of information on Administrative Law and circulating it through the bulletin, and

C. Giving individual members an opportunity to participate through the work of the committees.

Any suggestions as to either additional lines of endeavor or ways of improving the existing channels will be received with great appreciation.

Harry H. Frank, Vice Chairman
Charles Effinger Smoot, Chairman

## NATIONAL COMMITTEE REPORT ON LEGISLATION

The National Committee submits herewith a report of the status of legislation introduced in the 83d Congress which has been deemed of interest to the Section of Administrative Law, showing the number of each bill, the date of introduction, the sponsor of the bill, the title of the bill, Con-

gressional action on the bill and the Section Committee or officer to which the bill has been assigned for consideration and appropriate action. (Bills enacted into law are noted with asterisks.)

*Senate Bills*

S. 14

Introduced Jan. 7, 1953, by Sen. McCarran, To improve the administration of justice by the creation of an Administrative Court of the United States; referred to the Committee on the Judiciary and now pending before Subcommittee No. 4 thereof; assigned to Mr. Robert M. Benjamin and to the Committee on Improvement of Administrative Procedures.

S. 17

Introduced Jan. 7, 1953, by Sen. McCarran, To provide general rules of practice and procedure before Federal agencies; referred to the Committee on the Judiciary and now pending before Subcommittee No. 4 thereof—public hearing held Mar. 12, 1953, at which Section representatives appeared and testified; assigned to Mr. Robert M. Benjamin.

S. 18

Introduced Jan. 7, 1953, by Sen. McCarran, To amend the Administrative Procedure Act, and eliminate certain exemptions therefrom; referred to the Committee on the Judiciary, reported to the Senate favorably, without amendment Mar. 20, 1953, passed the Senate as reported May 6, 1953, and referred to the House Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Procedure Act.

S. 19

Introduced Jan. 7, 1953, by Sen. McCarran, To suspend the running of the statutes of limitations applicable to offenses involving performance of official duties by Government officers and employees during periods of Government service; referred to the Committee on the Judiciary, where it is now pending; assigned to Committee on Code of Conduct for Government Employees.

* S. 24

Introduced Jan. 7, 1953, by Sen. McCarran, To permit judicial review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged; referred to Committee on the Judiciary, reported to the Senate favorably with amendments; passed the Senate June 8, 1953; passed the House, amended, April 26, 1954; Senate agreed to House amendments; approved by the President, May 11, 1954 —Public Law 356; assigned to Committee on Finality Clauses in Government Contracts.

S. 26

Introduced Jan. 7, 1953, by Sen. McCarran, To amend ch. 19, title 5, of the United States Code, entitled "Administrative Procedure," so as to prohibit the employment by any person of any member, official, attorney, or em-

ployee of a Government agency except under certain conditions; referred to the Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Procedure Act, Committee on Code of Conduct for Government Employees, and Committee on Administrative Practitioners.

S. 43

Introduced Jan. 7, 1953, by Sen. McCarran, To amend sec. 215 of title 18, United States Code, to prohibit officers or employees of the United States from accepting payments for appointment or retention of a person in office or employment under the United States; referred to the Committee on the Judiciary; postponed indefinitely by action of the full Committee, Mar. 15, 1954; assigned to Committee on Administrative Practitioners.

* S. 106

Introduced Jan. 7, 1953, by Sen. McCarran, To amend the Administrative Procedure Act, and eliminate certain exemptions therefrom; referred to the Committee on Government Operations; enacted as Public Law 108, approved July 10, 1953; assigned to Committee on Administrative Procedures Act.

* S. 107

Introduced Jan. 7, 1953, by Sen. Anderson, A bill to provide for the development of the oil and gas reserves of the Continental Shelf adjacent to the shores of the United States, to protect certain equities therein, to confirm the titles of the several states to lands underlying inland navigable waters within State boundaries, and for other purposes; referred to Committee on Interior and Insular Affairs, which reported favorably a similar bill, S. 1901, enacted as Public Law 212, approved Aug. 7, 1953; assigned to Committee on Natural Resources and Interior Affairs.

S. 223

Introduced Jan. 7, 1953, by Sen. Butler of Nebraska, To amend sec. 284 of the United States Code relating to disqualifications of former officers and employees in matters connected with their former duties; referred to Committee on the Judiciary, where it is now pending; assigned to Committee on Administrative Practitioners.

S. 637

Introduced Jan. 26, 1953, by Sen. Williams, To amend sec. 284 of title 18 of the United States Code so as further to prohibit former officers and employees of the United States from acting as counsel, attorney, or agent in matters connected with their former office or employment; referred to Committee on the Judiciary, where it is now pending following hearings held on Mar. 24, 1953; assigned to Committee on Administrative Practitioners.

S. 657

Introduced Jan. 26, 1953, by Sen. Taft, To amend the National Labor Relations Act, as amended, to provide for improved procedures of the NLRB and to expedite its disposition of cases; re-

ferred to the Committee on Labor and Public Welfare, where it is now pending; assigned to Committee on Labor.

* S. 753

Introduced Feb. 2, 1953, by Sen. Capehart, To provide standby economic controls, and for other purposes; referred to Committee on Banking and Currency, which reported favorably to the Senate a revised bill, S. 1081, which passed the Senate May 19, 1953, passed the House June 9, 1953, approved by the President June 30, 1953—Public Law 95; assigned to Committee on Emergency Agencies.

S. 776

Introduced Feb. 4, 1953, by Sen. Green, To repeal Section 10 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (the so-called Walsh-Healey Act); referred to the Committee on Labor and Public Welfare, where it is now pending before a subcommittee; assigned to Committee on Labor.

S. 905

Introduced Feb. 13, 1953, by Sen. Johnson of Colorado, To authorize the Interstate Commerce Commission to revoke or amend, under certain conditions, water carrier certificates and permits; referred to the Committee on Interstate and Foreign Commerce; where it is now pending; assigned to

S. 906

Introduced Feb. 13, 1953, by Sen. Johnson of Colorado, To establish the finality of contracts between the Government and Common Carriers of passengers and freight subject to the Interstate Commerce Act; referred to Committee on Interstate and Foreign Commerce; passed the Senate July 6, 1954, referred to House Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Finality Clauses in Government Contracts.

S. 1118

Introduced Feb. 27, 1953, by Sen. Capehart, To provide for the control and regulation of bank holding companies, and for other purposes; referred to the Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

* S. 1185

Introduced Mar. 4, 1953, by Sen. Langer, To amend further the Federal Register Act, as amended; referred to Committee on the Judiciary; postponed indefinitely by action of the full Committee when similar bill, H.R. 1806, was ordered reported favorably, (H.R. 1806 subsequently enacted as Public Law 200, approved by the President Aug. 5, 1953); assigned to Committee on Improvement of Administrative Pro-

S. 1264

Introduced Mar. 11, 1953, by Sen. Ives, To amend the Labor Management Relations Act of 1947, as amended, so as to clarify the authority of the States and Territories with respect to certain cases within the purview of such Act; referred to Committee on Labor and Public Welfare, where hearings were concluded Apr. 30, 1953, and it is now pending further consideration by the full committee; assigned to Committee on Labor.

S. 1287

Introduced Mar. 11, 1953, by Sen. Hunt, To amend the Natural Gas Act; referred to Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Gas and Electric Power.

S. 1491

Introduced Mar. 27, 1953, by Sen. Butler of Nebraska, To provide for the revision of the public land laws in order to provide for orderly use, improvement, and development of the Federal lands and to stabilize the livestock industry dependent upon the Federal range, and for other purposes; referred to Committee on Interior and Insular Affairs; assigned to Committee on Natural Resources and Interior Affairs and to Committee on the Administrative Procedure Act.

S. 1501

Introduced Mar. 30, 1953, by Sen. Tobey, To authorize the Interstate Commerce Commission to revoke, amend, or suspend, under certain conditions, water carrier certificates and permits; referred to Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Transportation, and to Committee on the Administrative Procedure Act.

S. 1514

Introduced May 7, 1953, To establish a Commission on Intergovernmental Relations; referred to Committee on Government Operations; enacted as Public Law 109, approved July 10, 1953; assigned to Committee on Administrative Procedure Act.

S. 1680

Introduced April 17, 1953, by Sen. Aiken, To provide for emergency action under section 22 of the Agricultural Adjustment Act, as amended; referred to Committee on Agriculture and Forestry; provisions of this bill incorporated in Trade Agreements Extension Act of 1953, H. R. 5495, which was enacted as Public Law 215, approved by the President Aug. 7, 1953; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

S. 1708

Introduced Apr. 21, 1953, by Sen. McCarran, To amend Section 11 of the Administrative Procedure Act, and for other purposes; referred to Committee on the Judiciary, where it is now pending before Subcommittee No. 4; assigned to Committee on Administrative Procedure Act, to Committee on Improvement of Administrative Proced-

ures, and to Committee on Selection and Qualification of Hearing Examiners.

S. 1752

Introduced Apr. 24, 1953, by Sen. Langer, To establish good faith as a defense in certain cases; referred to Committee on the Judiciary, where it is now pending; public hearing held July 1, 1954, at which Section representatives appeared and testified; assigned to Mr. Robert M. Benjamin, and to Committee on Improvement of Administrative Procedures.

S. 2049

Introduced June 4, 1953, by Sen. Smith of North Carolina, To prohibit the payment of compensation to officers or employees of the Government who have refused on grounds of self-incrimination to give testimony before Congressional Committees; referred to Committee on the Judiciary, where it is now pending; assigned to Committee on Code of Conduct for Government Employees.

S. 2647

Introduced January 11, 1954, by Sen. McCarran, To create an independent Civil Aeronautics Authority and an independent Air Safety Board; referred to Committee on Interstate and Foreign Commerce, where hearings held; assigned to Committee on Transportation.

S. 2942

Introduced February 15, 1954, by Sen. Lehman, To amend Sec. 9 of the Hatch Act with respect to its application to officers and employees performing duties relating to employee loyalty or security programs; referred to Committee on Rules and Administration, where it is now pending; assigned to Committee on Code of Conduct of Government Employees.

S. 3142

Introduced March 16, 1954, by Sen. Douglas, To promote ethics in Government; referred to Committee on Government Operations, where it is now pending; assigned to Committee on Code of Conduct of Government Employees.

S. 3292

Introduced April 14, 1954, by Sen. Ives, To make certain changes in the Immigration and Nationality Act; referred to Committee on Judiciary, where it is now pending in Subcommittee; assigned to Committee on Immigration and Naturalization.

S. 3409

Introduced May 6, 1954, by Sen. Bricker, To amend the Civil Aeronautics Act of 1938 in order to permit reduced rates for certain transportation furnished to the Department of Defense, and to establish finality of contracts with respect to such rates; referred to Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Finality Clauses in Government Contracts.

S. 3692

Introduced July 1, 1954, by Sen. McCarran, To improve the administration of justice and reduce expenditures by eliminating overlapping functions of Federal agencies, preserving State and local jurisdiction, utilizing existing judicial remedies, and forbidding unnecessary proceedings; referred to Committee on the Judiciary, where it is now pending; assigned to Committee on Improvement of Administrative Procedures.

*House Bills*

H. R. 12

Introduced Jan. 3, 1953, by Rep. Spence, To provide for the control and regulation of bank holding companies, and for other purposes; referred to the Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 114

Introduced Jan. 3, 1953, by Rep. Burleson, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to the Committee the Judiciary where it has been laid on the table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

H. R. 128

Introduced Jan. 3, 1953, by Rep. Fernandez, To provide a one-year extension of the five-year limitation on the time for presenting Indian claims to the Indian Claims Commission; referred to the Committee on Interior and Insular Affairs where it is now pending; assigned to Committee on Natural Resources and Interior Affairs.

H. R. 131

Introduced Jan. 3, 1953, by Rep. Heselton, To provide for the separation of subsidy from air-mail pay, and for other purposes; referred to the Committee on Interstate and Foreign Commerce where it is now pending; assigned to the Committee on Communications.

H. R. 134

Introduced Jan. 3, 1953, by Rep. Heselton, To amend the Natural Gas Act to authorize the Federal Power Commission to prescribe safety requirements for natural-gas companies; referred to the Committee on Interstate and Foreign Commerce where it is now pending; assigned to the Committee on Gas and Electric Power.

H. R. 166

Introduced Jan. 3, 1953, by Rep. Mills, To establish a Tax Settlement Board; referred to the Committee on Ways and Means where it is now pending; as-

signed to the Chairman of the Administrative Law Section.

H. R. 171

Introduced Jan. 3, 1953, by Rep. Rees of Kansas, To exempt certain functions of the Post Office Department from the Administrative Procedure Act, and for other purposes; referred to the Committee on Post Office and Civil Service where it is now pending; assigned to the Committees on Communications and Administrative Procedure Act.

H. R. 196

Introduced Jan. 3, 1953, by Rep. Wickersham, To extend the time within which claims may be presented to the Indian Claims Commission; referred to the Committee on Interior and Insular Affairs; assigned to Committee on Natural Resources and Interior Affairs.

H. R. 223

Introduced Jan. 3, 1953, by Rep. Boggs, To confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundaries and to provide for the use and control of said lands and resources; referred to Committee on the Judiciary where it has been laid on the table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

H. R. 287

Introduced Jan. 3, 1953, by Rep. Hoffman, To provide for the separation of subsidy from air-mail pay in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government; referred to the Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Transportation.

H. R. 291

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, To provide for the reorganization of the Department of the Treasury in accordance with recommendations of the Commission on Organization of the Executive Branch of the Government; referred to Committee on Ways and Means where it is now pending; assigned to Committee on Code of Conduct for Government Employees.

H. R. 292

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, To Provide for the reorganization of the Department of Agriculture in accordance with the recommendations of the Commission on Organization of the Executive Branch of the Government; referred to Committee on Agriculture where it is now pending; assigned to Committee on Administrative Procedure Act.

H. R. 297

Introduced Jan. 3, 1953, by Rep. Hoffman of Michigan, Making various changes in laws applicable to the Post Office Department in accordance with the recommendations of the Commission on Organization of the Executive Branch of the Government; referred

to Committee on Post Office and Civil Service where it is now pending; assigned to Committee on Communications.

H. R. 306

Introduced Jan. 3, 1953, by Rep. Kelly of New York, Providing that there shall be equal pay for equal work for women; referred to Committee on Education and Labor where it is now pending; assigned to Committee on Labor and Committee on Improvement of Administrative Procedures.

H. R. 312

Introduced Jan. 3, 1953, by Rep. McDonough, To confirm and establish the titles of the States to lands and resources in and beneath navigable waters within State boundaries and to provide for the use and control of said lands and resources; referred to Committee on the Judiciary where it was laid on the table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 316

Introduced Jan. 3, 1953, by Rep. McDonough, To amend the Federal Home Loan Bank Act, The Home Owners' Loan Act of 1933, title IV of the National Housing Act, and the judicial code in order to define the limitations of Government control of savings and loan associations, to provide judicial and administrative remedies, and for other purposes; referred to Committee on Banking and Currency; subject of this bill included in H. R. 7839, reported favorably, passed the House April 2, 1954, passed the Senate June 3, and now pending in Conference; assigned to Committee on Advertising, Trade and Securities Regulation.

* H. R. 337

Introduced Jan. 3, 1953, by Rep. Rodino, To authorize the issuance of three hundred thousand special non-quota immigration visas to certain refugees, persons of German ethnic origin, and natives of Italy, Greece, and the Netherlands, and for other purposes; referred to Committee on the Judiciary; superseded by H. R. 6481, The Refugee Relief Act, enacted as Public Law 203, approved by the President Aug. 7, 1953; assigned to Committee on Immigration and Naturalization.

H. R. 348

Introduced Jan. 3, 1953, by Rep. Rogers of Texas, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to Committee on the Judiciary where it was laid on the table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 357

Introduced Jan. 3, 1953, by Rep. Willis, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to Committee on the Judiciary where it has been laid on table (see H. R. 4198); assigned to Committee on Resources and Interior Affairs.

H. R. 384

Introduced Jan. 3, 1953, by Rep. Byrnes of Wisconsin, To provide for standards to be prescribed by the Secretary of Agriculture governing imported agricultural food products; referred to Committee on Agriculture where it is pending; assigned to Committee on Agriculture, Food, Drugs and Related Subjects.

H. R. 408

Introduced Jan. 3, 1953, by Rep. Celler, To regulate the interception of communications in the interest of national security and the safety of human life; referred to Committee on the Judiciary; tabled when H. R. 8649 reported favorably in lieu thereof, which passed the House April 8, 1954, now pending before Senate Committee on the Judiciary; assigned to Committee on Communications and to the Special Committee on Individual Rights as Affected by National Security.

H. R. 485

Introduced Jan. 3, 1953, by Rep. Keating, To provide that each member of the bar of the highest court of a State or of a Federal court shall be eligible to practice before all administrative agencies; referred to Committee on the Judiciary where it is pending before Subcommittee No. 1; reported adversely to full Committee Feb. 1, 1954, no further action taken; assigned to Committee on Administrative Practitioners.

H. R. 515

Introduced Jan. 3, 1953, by Rep. Lane, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to Committee on the Judiciary; joint hearing held April 14, 1953; tabled when H. R. 1825 reported favorably (see infra); assigned to Committee on Finality Clauses in Government Contracts.

H. R. 569

Introduced Jan. 3, 1953, by Rep. Rees of Kansas, To authorize the Postmaster General to impound mail in certain cases; referred to Committee on Post Office and Civil Service; reported favorably and passed the House April 8, 1954; referred to Senate Committee on Post Office and Civil Service where it is now pending; assigned to Committee on Communications.

H. R. 629

Introduced Jan. 3, 1953, by Rep. Teague, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to provide for the use, control, exploration, development, and conservation of certain resources of the continental shelf lying outside of State boundaries; referred to Committee on the Judiciary where it was laid on table (See H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

H. R. 990

Introduced Jan. 6, 1953, by Rep. Bennett of Florida, To amend the Administrative Procedure Act, so as to prohibit, under certain conditions, the employment of a former employee of the Federal Government by any person, concern, or government other than the Federal Government; referred to Committee on the Judiciary where it is pending awaiting reports from several Departments; assigned to Committee on Administrative Procedure Act, Committee on Code of Conduct for Government Employees, and Committee on Administrative Practitioners.

H. R. 995

Introduced Jan. 6, 1953, by Rep. Budge, To amend the Defense Production Act of 1950 so as to suspend price and wage controls until the President or the Congress finds that such controls are needed; referred to Committee on Banking and Currency where bill was laid on table as all controls were suspended; assigned to Committee on Emergency Agencies.

H. R. 1051

Introduced Jan. 6, 1953, by Rep. Miller of New York, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to Committee on the Judiciary; tabled when H. R. 1825 reported favorably (see infra); referred to Committee on Finality Clauses in Government Contracts.

H. R. 1285

Introduced Jan. 7, 1953, by Mr. Multer, To amend section 10(d) of the Administrative Procedure Act so as to broaden judicial relief under that section pending review of administrative action; referred to Committee on the Judiciary where it is now pending; assigned to Committee on Administrative Procedure Act.

H. R. 1418

Introduced Jan. 9, 1953, by Rep. Small, To amend the Hatch Act to permit all officers and employees of the Government to take an active part in political management or political campaigns; referred to Committee on House Administration where it is pending before subcommittee; assigned to Committee on Code of Conduct for Government Employees.

H. R. 1744

Introduced Jan. 14, 1953, by Rep. Yorty, To provide that each member of the bar of the highest court of a State or of a Federal court shall be eligible to practice before all administrative agencies; referred to Committee on the Judiciary; reported adversely by subcommittee, no further action taken; assigned to Committee on Administrative Practitioners. (Identical to H. R. 485)

* H. R. 1806

Introduced Jan. 16, 1953, by Mr. Celler To amend further the Federal Register Act, as amended; referred to Committee on the Judiciary; passed the House July 7, 1953; passed the Senate July 27, 1953; approved by the President Aug. 5, 1953—Public Law 200.

H. R. 1825

Introduced Jan. 16, 1953, by Rep. Jonas of Illinois, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to Committee on the Judiciary; hearings held April 14, 1953; reported favorably to the House July 21, 1953; tabled by the Rules Committee Mar. 5, 1954; assigned to Committee on Finality Clauses in Government Contracts. (Identical to H. R. 1051)

* H. R. 1839

Introduced Jan. 16, 1953, by Rep. Reed of Illinois, To permit reviews of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes; referred to Committee on the Judiciary; superseded by S. 24, which was enacted into law (see supra); assigned to Committee on Finality Clauses in Government Contracts.

H. R. 2473

Introduced Feb. 2, 1953, by Mr. Wier, To provide for dissolution of interstate bank holding companies; referred to Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

* H. R. 2679

Introduced Feb. 6, 1953, by Rep. Bow, To amend the Natural Gas Act of 1938, as amended; referred to Committee on Interstate and Foreign Commerce; Committee reported favorably in lieu thereof H. R. 5976, which passed House July 30, 1953, passed Senate March 15, 1954, approved by the President March 27, 1954—Public Law 323; assigned to Committee on Gas and Electric Power.

* H. R. 2769

Introduced Feb. 6, 1953, by Rep. Wolverton, To amend section 704 of the Federal Food, Drug, and Cosmetic Act, so as to protect the public health and welfare by restoring certain authority for factory inspections; referred to Committee on Interstate and Foreign Commerce; Committee reported favor-

ably in lieu thereof H. R. 5740, which passed House July 16, 1953, passed Senate Aug. 3, 1953, approved by the President Aug. 7, 1953—Public Law 217; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 2928

Introduced Feb. 12, 1953, by Rep. Celler To amend the Federal Deposit Insurance Act to provide safeguards against mergers and consolidations of banks which may adversely affect competition or unduly tend to create a monopoly in the field of banking; referred to Committee on Banking and Currency where it is now pending; assigned to Committee on Advertising, Trade and Securities Regulation.

H. R. 2970

Introduced Feb. 12, 1953, by Rep. O'Hara of Minnesota, To amend the Interstate Commerce Act in order to expedite and facilitate the termination of railroad reorganization proceedings under section 77 of the Bankruptcy Act and to require the Interstate Commerce Commission to consider, in stock modification plans, the assents of controlled or controlling stockholders, and for other purposes; referred to Committee on Interstate and Foreign Commerce where it is now pending; assigned to Committee on Transportation.

H. R. 3057

Introduced Feb. 16, 1953, by Rep. Bennett of Florida, To prohibit the employment by the Government of the United States of persons who are disloyal or who believe in the right to strike against the Government of the United States, and for other purposes; pending before Committee on Post Office and Civil Service—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

H. R. 3067

Introduced Feb. 16, 1953, by Rep. Condon, To amend the Labor Management Relations Act, 1947, and for other purposes; referred to Committee on Education and Labor where public hearings have been concluded; assigned to Committee on Labor.

H. R. 3288

Introduced Feb. 19, 1953, by Rep. Aspinall, To establish the finality of contracts between the Government and common carriers of passengers and freight subject to the Interstate Commerce Act; pending before Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Finality Clauses in Government Contracts.

H. R. 3426

Introduced Feb. 24, 1953, by Rep. Morrison, To provide for the right of appeal to the Civil Service Commission in the case of persons separated from the classified civil service for any cause other than reduction in force, and for other purposes; pending before Committee on Post Office and Civil Service—no action scheduled; assigned to

Committee on Code of Conduct for Government Employees.

* H. R. 3551

Introduced Feb. 26, 1953, by Rep. Sullivan, To amend section 704 of the Federal Food, Drug, and Cosmetic Act, so as to protect the public health and welfare by providing adequate authority for factory inspections; referred to Committee on Interstate and Foreign Commerce; Committee reported favorably H. R. 5740, enacted as P. L. 217 (see H. R. 2769, supra); assigned to Committee on Agriculture, Food, Drugs and Related Subjects.

* H. R. 3634

Introduced Mar. 3, 1953, by Rep. Celler, To amend title 28 of the United States Code so as to provide for a limited judicial review of decisions of Federal officers under "finality clauses" in Government contracts; referred to Committee on the Judiciary; superseded by S. 24, which was enacted into law (see supra); assigned to Committee on Finality Clauses in Government Contracts.

H. R. 3693

Introduced Mar. 5, 1953, by Rep. Fogarty, To repeal section 10 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (the so-called Walsh-Healey Act); referred to Committee on the Judiciary (no action scheduled); assigned to Committee on Labor.

H. R. 3707

Introduced Mar. 5, 1953, by Rep. Priest, To amend the Natural Gas Act of 1938, as amended; pending before Committee on Interstate and Foreign Commerce; Committee reported favorably H. R. 5976, enacted as P. L. 323 (see H. R. 2679, supra); assigned to Committee on Gas and Electric Power.

* H. R. 3898

Introduced Mar. 11, 1953, by Rep. Wolcott, To amend section 202(e) of the Federal Power Act, with respect to the jurisdiction of the Federal Power Commission over persons and facilities engaged in the transmission or sale of electric energy to foreign countries pending before Committee on Interstate and Foreign Commerce; Committee reported favorably in lieu thereof S. 1442, enacted as Public Law 210, approved by the President Aug. 7, 1953; assigned to Committee on Gas and Electric Power.

H. R. 3977

Introduced Mar. 16, 1953, by Rep. Clardy, To amend the Communications Act of 1934, as amended, to provide that station licenses shall be issued for an indefinite term, and shall be revoked only by the United States District Court for the District of Columbia, and for other purposes; pending before Committee on Interstate and Foreign

Commerce—no action scheduled; assigned to Committee on Communications.

* H. R. 4198

Introduced Mar. 25, 1953, by Rep. Graham of Pennsylvania, To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, and to provide for the use and control of said lands and resources and the resources of the outer Continental Shelf; referred to the Committee on the Judiciary; passed House of Representatives Apr. 1; passed Senate with amendments May 5; House adopted H. Res. 232 agreeing to Senate amendments May 13; approved by the President May 22; Public Law No. 31.

H. R. 4504

Introduced Apr. 13, 1953, by Rep. Wolverton, To amend Section 22 of the Interstate Commerce Act, so as to establish the finality of contracts between the Government and common carriers of passengers and freight subject to the Interstate Commerce Act; pending before the Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Finality Clauses in Government Contracts. (Similar to S. 906)

H. R. 4901

Introduced Apr. 28, 1953, by Rep. Miller of Nebraska, To amend the Federal Food, Drug, and Cosmetic Act, as amended, by providing for the regulation of chemical additives in food to insure that such chemical additives has been adequately pretested and declared safe; pending before Committee on Interstate and Foreign Commerce—no action scheduled; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 5055

Introduced May 7, 1953, by Rep. Hale, To amend sections 401 and 701 of the Federal Food, Drug, and Cosmetic Act so as to simplify the procedures governing the establishment of food standards; pending before Committee on Interstate and Foreign Commerce; Committee reported favorably in lieu thereof H. R. 6434, enacted as Public Law 335, approved by the President April 15, 1954; assigned to Committee on Agriculture, Food, Drugs, and Related Subjects.

H. R. 5063

Introduced May 7, 1953, by Rep. Price, To prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes; referred to Committee on the Judiciary; tabled when H. R. 1825 reported favorably (see supra); assigned to Committee on Finality Clauses in Government Contracts.

* H. R. 5141

Introduced May 12, 1953, by Rep. Hill, To create the Small Business Administration and to preserve small business institutions and free, competitive enterprise; referred to Committee on

Banking and Currency, reported favorably May 28, 1953; passed the House June 5, 1953, passed the Senate July 20, 1953, approved by the President July 30, 1953—Public Law 163; assigned to Committee on Emergency Agencies.

* H. R. 5740

Introduced June 15, 1953, by Rep. Wolverton, To amend the Federal Food, Drug and Cosmetic Act by providing certain authority for factory inspection; referred to Committee on Interstate and Foreign Commerce; reported favorably, passed House July 16, 1953, passed Senate Aug. 3, 1953; approved by the President Aug. 7, 1953—Public Law 217; assigned to Committee on Agriculture, Food and Drugs.

H. R. 6946

Introduced Jan. 6, 1954, by Rep. Willis, To permit review of decisions of Government contracting officers involving questions of fact arising under Government contracts in cases other than those in which fraud is alleged, and for other purposes; referred to Committee on the Judiciary; superseded by S. 24, which was enacted into law (see supra); assigned to Committee on Finality Clauses in Government Contracts.

H. R. 7105

Introduced Jan. 11, 1954, by Rep. Boggs, To amend subsection 216(c), part II of the Interstate Commerce Act to require the establishment by motor carriers of reasonable through routes and joint rates; referred to Committee on Interstate and Foreign Commerce, where it is now pending; assigned to Committee on Transportation.

H. R. 8048

Introduced Feb. 23, 1954 by Rep. Teague, To amend Sec. 207 of the Legislative Reorganization Act of 1946, as amended, so as to authorize a full and fair hearing of claims when demanded by the applicant; referred to Committee on Armed Services, where it is now pending; assigned to Committee on Improvement of Administrative Procedures.

H. R. 8075

Introduced Feb. 25, 1954, by Rep. Fino, To grant to persons in the classified civil service the right to a hearing before removal or suspension, and the right to a judicial review of a removal or suspension; referred to Committee on Post Office and Civil Service, where it is now pending; assigned to Committee on Code of Conduct of Government Employees.

H. R. 8807

Introduced April 12, 1954, by Rep. Scott, To make certain changes in the Immigration and Nationality Act; referred to Committee on the Judiciary, where it is now pending before Subcommittee No. 1; assigned to Committee on Immigration and Naturalization.

H. R. 9035

Introduced May 6, 1954, by Rep. Hyde To amend Sec. 11 of the Administra-

tive Procedure Act, and for other purposes; referred to Committee on the Judiciary, where it is now pending; assigned to Committee on the Administrative Procedure Act.

*House Joint Resolutions*

H. J. Res. 11

Introduced Jan. 3, 1953, by Rep. Boggs, To provide the power of subpena and to grant immunity in certain investigations relating to improper and illegal conduct in the transaction of the business of the Government of the United States, and for other purposes; referred to Committee on the Judiciary where it is now pending; assigned to Chairman and Vice-Chairman of Section.

H. J. Res. 126

Introduced Jan. 13, 1953, by Rep. Feighan, To provide for the continuance of certain mineral leases issued by the States covering the submerged lands of the Continental Shelf and for the issuance of certain other mineral leases on such lands by the United States, to provide that the royalties from such leases shall be used for grants-in-aid of education and national defense, and for other purposes; referred to Committee on the Judiciary where it was laid on table (see H. R. 4198); assigned to Committee on Natural Resources and Interior Affairs.

*House Concurrent Resolutions*

H. Con. Res. 2

Introduced Jan. 3, 1953, by Rep. Bennett of Florida, That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders; referred to Committee on Post Office and Civil Service where it is now pending—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

H. Con. Res. 10

Introduced Jan. 3, 1953, by Rep. St. George, That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government officials and employees, including officeholders; referred to Committee on Post Office and Civil Service where it is now pending—no action scheduled; assigned to Committee on Code of Conduct for Government Employees.

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Rufus G. Poole
Chairman, National Committee

L. Clair Nelson
Vice-Chairman, National Committee